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CRIMINAL LAW AND PROCEDURE

UNITED STATES V. DUNCAN: THE PROSECUTION OF FALSE STATEMENTS MADE TO GOVERNMENT AGENTS UNDER 18 USC § 1001

A. INTRODUCTION

In *United States v. Duncan*,¹ the Ninth Circuit held that when a declarant makes an affirmative false statement² to a government investigator, which could have influenced or affected a governmental function,³ the statement is punishable under 18 U.S.C. section 1001.⁴

On April 3, 1982, two special agents of United States Customs were on duty at the Los Angeles International Airport, observing travelers about to board a flight to Bolivia.⁵ Noticing defendant's behavior, the agents became suspicious that he might

1. 693 F.2d 971 (9th Cir. 1982) (per Alarcon, J.; the other panel members were Burns, D.J., sitting by designation, and Fletcher, J., dissenting).

2. See, e.g., *United States v. Moore*, 638 F.2d 1171, 1176 (9th Cir. 1980) (describing an "affirmative" false statement as more than a mere "no" answer to a question posed by a government agent).

3. 693 F.2d at 976 (citing *United States v. Carrier*, 654 F.2d 559 (9th Cir. 1981) (where the court stated that the test for determining the materiality of a falsification was whether the statement influenced or affected a governmental function)).

4. 18 U.S.C. § 1001 (1976) provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by an trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$100,000 or imprisoned not more than five years, or both.

Id.

5. The agents' assignment was to "survey and, if necessary, search departing passengers to ensure the compliance of international travelers with federal currency laws." 693 F.2d at 973.

be a currency smuggler.⁶ When the agents questioned the defendant about the amount of money he was carrying out of the country, the defendant responded falsely that he possessed an amount under the legal limit.⁷ The agents searched the defendant and discovered that he was carrying more than that amount.⁸ They arrested him and charged him with lying to government agents in violation of section 1001, and with violating the currency reporting statute, 31 U.S.C. section 5316.⁹

The defendant was convicted on the section 1001 count.¹⁰ He appealed, contending that he could not be convicted under section 1001, because (1) there was a narrower, more specific statute which applied, (2) his statement was not material within the meaning of section 1001, and (3) his statement came under the "exculpatory no" exception¹¹ to the application of the statute.¹² A divided Ninth Circuit panel affirmed the decision of the

6. The defendant was standing at the departure gate when he attracted the agents' attention. The agents found his behavior suspicious because he did not "have the same demeanor as the other passengers and did not appear . . . to be someone looking forward to a trip out of the United States." *Id.* The defendant was traveling alone, not talking to anyone, and appeared to be looking for someone. The agents believed that he met the narcotics/currency profile used by Customs to identify potential offenders. *Id.*

7. The agents asked the defendant if he had anything to report to Customs prior to his departure. The defendant answered in the negative, and then offered, "I know I have to report anything over \$5,000, but I have only \$5,000." *Id.* at 974.

8. The defendant was carrying over \$21,000, hidden in several places on his body. *Id.*

9. *Id.*; The government dismissed the § 5316 count and proceeded to trail solely on the § 1001 charge. *Id.* at 973. See *supra* note 4 for text of 18 U.S.C. § 1001; 31 U.S.C. § 5316 (1982) (amending 31 U.S.C. § 1101 (1976) provides in pertinent part: "[A] person . . . shall file a report . . . when the person . . . knowingly . . . transports . . . monetary instruments of more than \$5,000 at one time . . . from a place in the United States to or through a place outside the United States . . ." *Id.*).

10. *Id.*

11. The "exculpatory no" exception is a judicially engrafted exception to the statute, first adopted by the circuit courts in *Paterno v. United States*, 311 F.2d 298, 309 (5th Cir. 1962) (per curiam). The Fifth Circuit held that mere "no" answers denying involvement in criminal activity, given in response to questions initiated by the government, without any affirmative, aggressive or overt misstatement on the part of the defendant were not within the scope of § 1001.

12. The defendant raised two other substantive grounds for reversal. First, the defendant contended that the evidence against him should have been excluded because the stop and search at the airport was illegal, to wit, the agents stopped and searched the defendant without a warrant or probable cause. 693 F.2d at 974. Second, the defendant argued that his statements were inadmissible because they were made during a custodial interrogation before *Miranda* warnings were given. The defendant made his first statement before the agents had probable cause to believe he had violated the currency statutes. He made another statement after the agents discovered that he had violated those

District Court.¹³

B. BACKGROUND

1. *Legislative History:*

Section 1001 provides that it is a federal offense to give a false statement to a government agent.¹⁴ The statute prohibits

statutes. *Id.* at 979.

In response to the defendant's first contention, the majority pointed out that the Ninth Circuit has held that a person leaving the United States may be stopped and searched without probable cause or any suspicion, pursuant to border search principles. *Id.* at 977 (citing *United States v. Stanley*, 545 F.2d 661, 666-67 (9th Cir. 1976), *cert. denied*, 436 U.S. 917 (1978)). *But see* *United States v. Ramsey*, 431 U.S. 606 (1977) (where the Supreme Court recognized the constitutionality of making border searches of incoming travelers only). The majority noted that the Supreme Court has stated in dictum that such searches do not violate the fourth amendment. 693 F.2d at 977 (citing *California Bankers Assn v. Schultz*, 416 U.S. 21, 63 (1974) (where the Supreme Court stated in dictum that no violation of the fourth amendment occurs when those entering and leaving the country are "examined as to their belongings and effects.")). The majority argued that a border search of departing travelers comports with the fourth amendment, unless, considering the scope of the intrusion and the manner of its conduct, the search violates "reasonableness". 603 F.2d at 977 (citing *United States v. Guadalupe-Garza*, 421 F.2d 876, 878 (9th Cir. 1970) (where the Supreme Court stated that in the context of a border search reasonableness is "incapable of comprehensive definition or of mechanical application").) Under this rule, the majority determined that the stop and search of the defendant was reasonable. The search occurred at the "functional equivalent" of a border and there was no indication that the manner in which the search was conducted was unreasonable. The search was no longer than necessary to ensure that no laws were violated and was conducted out of the public view. 693 F.2d at 978.

The dissent argued, however, that the stop and search was illegal on both statutory and constitutional grounds. First, the dissent pointed out that 31 U.S.C. § 1105 (1976), which grants Customs explicit authority to search travelers for unreported currency, plainly requires a warrant. 693 F.2d at 982. Second, the dissent cited *United States v. Ramsey*, 431 U.S. 606 (1977), to show that the Supreme Court recognizes the constitutionality of border searches with respect to incoming travelers only. 693 F.2d at 983. The dissent maintained that the stop and search was illegal because the customs agents were unrestricted as to when and where they might perform the currency search involved in *Duncan*. *Id.* The defendant had no notice that he might be searched. He was singled out solely because of his "supposedly" suspicious behavior. *Id.*

In response to the defendant's second contention, the majority stated that the rule in the Ninth Circuit requires that *Miranda* warnings need not be given in border crossing situations "unless and until the questioning agents have probable cause to believe that the person questioned has committed an offense." *Id.* at 979 (quoting *United States v. Estrada-Lucas*, 651 F.2d 1261, 1265 (9th Cir. 1980)). The majority recognized that under this rule, one of the defendant's statements should have been excluded. 693 F.2d at 979. It concluded that the error was not grounds for reversal, however, because there was sufficient independent evidence of guilt. *Id.*

The dissent maintained that the statements obtained from the defendant should have been suppressed as fruit of the illegal stop and search. *Id.* at 984.

13. 693 F.2d at 973.

14. *See supra* note 4 for text of § 1001.

false statements which both result in pecuniary or property loss to the government and which are designed to frustrate the proper functioning of the regulatory schemes of government.¹⁵

Section 1001 originated in the false claims and related false statements provisions of the Act of March 2, 1863.¹⁶ The original Act was narrowly drawn to prevent pecuniary loss to the United States resulting from false claims and related false statements made by military personnel upon or against the government.¹⁷ From 1863 to 1934, the Act underwent several substantive changes which broadened its application.¹⁸ Until 1934, the Act only covered false statements relating to claims that involved pecuniary or property loss to the government.¹⁹ In 1934, during a period of national economic crisis, Congress further expanded the scope of the statute to include statements which impaired the proper functioning of government agencies.²⁰ Congress has

15. See *United States v. Gilliland*, 312 U.S. 86, 93 (1941) (where the Supreme Court explained that the statute was intended to reach both cases involving pecuniary or property loss to the government and cases where the false statement might pervert the authorized functions of government).

16. The original Act made it a criminal offense for any person in the military forces of the United States to make a knowing false claim or related false statement to any officer or department of the government. Act of March 2, 1863, Ch. 67, 12 Stat. 696.

17. See, e.g., *United States v. Bramblett*, 348 U.S. 503, 504 (1955), where the Supreme Court explained that the purpose of the Act was to prevent and punish frauds upon the Government of the United States, *id.* at 504, and pointed out that application of the Act was limited to military personnel. *Id.* at 504-05.

18. The first revision occurred in 1873, when Congress made the Act applicable to "every person", instead of only military personnel. Codification of December 1, 1873, approved June 22, 1874, R.S. § 5438.

The next significant revision occurred in 1918, when Congress extended the reach of the statute to cover false claims and related false statements given to "corporations in which the United States of America is a stockholder", in addition to those given to government agencies. Act of October 23, 1918, Pub. L. No. 65-228, § 35, 40 Stat. 1015.

19. See, e.g., *United States v. Cohn*, 270 U.S. 339 (1926), where the Court emphasized narrow scope of the statute. The Supreme Court held that the Act did not proscribe false statements made to Customs because the purpose of the statement was not to defraud the government of either its money or its property.

20. The amendment eliminated all words as to purpose and intent from the false statements statute. It extended the statute to cover any false statement "knowingly . . . and willfully . . . made . . . in any matter within the jurisdiction of any department or agency of the United States . . ." Act of June 18, 1934, Pub. L. No. 73-394, § 35, 48 Stat. 996. The purpose of the amendment was to remove the prior limitation of the statute to cases involving pecuniary or property loss to the government. *Gilliland*, 312 U.S. at 92-93. Congress intended the amendment to protect the authorized functions of government from the frustration which might result from deceptive practices. *Id.*

The historical situation which gave rise to the 1934 amendment was described by the Eighth Circuit:

not significantly changed the statute since 1934.²¹

2. *Supreme Court:*

The Supreme Court has discussed the scope of section 1001 in three decisions and has held repeatedly that the statute should be construed broadly in order to protect the proper functioning of the government. In *United States v. Gilliland*,²² decided soon after the 1934 amendment, the Court established that the application of the statute was not limited to statements involving pecuniary or property loss to the government.²³ The

During the economic collapse of the 1930's the government, at an accelerated pace, began entering the field of economic reform and regulation. Jurisdiction over various parts of our economy was being delegated to innumerable federal agencies. For a proper functioning of their regulative and reform power these agencies depended upon information supplied by the individuals and corporations with which they were dealing. The giving of false information to these agencies would, of course, seriously pervert their functions, making effective regulations impossible. However, a fatal defect in the existing law made punishment of such fraudulent activity very difficult.

Friedman v. United States, 374 F.2d 363, 366 (8th Cir. 1967).

18. In 1948, Congress put false claims and related false statements provisions into their present form. The provisions were divided into two separate statutes. The false claims provisions became 18 U.S.C. § 281 (1969). The false statements provisions is now 18 U.S.C. § 1001. Act of June 25, 1948, Pub. L. No. 80-772, § 1001, 62 Stat. 683.

A revision of the criminal code, presently being considered by Congress, would narrow the scope of § 1001. The senate report on the revision suggests that the penalty for a false "no" given during a criminal investigation in response to questions initiated by the government should be lessened:

[T]he somewhat natural propensity to [give a false no]—particularly in the context of an oral response to a law enforcement agent's on-the-spot interrogation—is deemed to warrant a less severe punishment, since such an exculpatory denial is not as likely as other false statements to be taken at face value and thereby to impede or affect the course or outcome of the criminal investigation.

S. REP. NO. 553, 96th Cong., 2d Sess. 365, 390 (1980). The House Report seeks to remove altogether oral false statements from the scope of the statute. H.R. REP. NO. 1396, 96th Cong., 2d Sess. 171, 181-82 (1980). The pending legislation is, of course, not binding on the courts.

21. 18 U.S.C. § 1001.

22. 312 U.S. 86 (1941).

23. The Supreme Court stated:

The amendment . . . broadened the provision so as to leave no adequate basis for the limited construction which had previously obtained . . . [T]here was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the

Court explained that the 1934 amendment reflected the congressional intent to protect the authorized functions of governmental departments and agencies from the frustration which might result from deceptive practices.²⁴ A few years later, in *United States v. Bramblett*,²⁵ the Court stated that there was no indication in either the committee reports or in the congressional debates that the scope of section 1001 was to be in any way restricted.²⁶ Most recently, in *Bryson v. United States*,²⁷ the Court made clear that the statute's jurisdictional requirement is not grounds to construe section 1001 as if its objects were narrow or technical.²⁸ The Court concluded that the term "jurisdiction" as found within the statute should be interpreted broadly, since section 1001 is intended to protect the integrity of official inquiries.²⁹

3. Ninth Circuit:

In *United States v. Brandow*,³⁰ where the defendant submitted a false written denial of involvement in a tax fraud to investigators of the Internal Revenue Service (IRS), the panel construed the statute broadly and held that section 1001 covered the statement.³¹ The panel emphasized that the false statement concerned a matter within the "jurisdiction" of the IRS, since as a matter of law the IRS had the power to act on the falsity.³²

authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described [in the statute]. We see no reason why this apparent intention should be frustrated by construction.

Id. at 93.

24. *Id.*

25. 348 U.S. 503 (1955).

26. The Supreme Court stated, "[a] greater variety of false statements were meant to be included [by the 1934 amendment]. There is no indication in either the committee reports or in the congressional debates that the scope of the statutes was to be in any way restricted." *Id.* at 507.

27. 396 U.S. 64 (1969).

28. *Id.* at 70-7 (citing *Ogden v. United States*, 303 F.2d 724, 742-43 (9th Cir. 1962) (where the court held that "jurisdiction" in section 1001 should not be interpreted as if its meaning were narrow or technical)).

29. The Supreme Court held that, "[a] statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001." 396 U.S. at 71.

30. 268 F.2d 559 (9th Cir. 1959) (per Barnes, J.; the other panel members were Chambers, J., and Jertberg, J.).

31. *Id.* at 562-65.

32. *Id.* at 564. The Ninth Circuit held that "a false statement is submitted in a matter within the jurisdiction of a department or agency within the meaning of 18 U.S.C.

The panel also noted that the statement was "material" within the meaning of section 1001 because the statement had the "intrinsic ability" to frustrate the functions of the agency involved.³³

In *United States v. Bedore*,³⁴ where the defendant made an affirmative false statement to a special agent of the Federal Bureau of Investigation (FBI),³⁵ the panel distinguished *Brandow*³⁶ and found that the defendant's false statement was not punishable under the statute.³⁷ The panel identified three aspects of a false statement to be considered in a section 1001 prosecution: the nature of the statement;³⁸ the effect of the statement on the government in general;³⁹ and the effect of the statement on the

§ 1001 if it relates to a matter as to which the Department had the power to act." *Ogden*, 303 F.2d at 743. In *Brandow*, the false statement concerned a matter within the jurisdiction of the IRS agents, because under 26 U.S.C. § 3654 (c)(1939) the agents were authorized to "see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with" 268 F.2d at 564. Moreover, the agents were authorized to "aid in the prevention, detection, and punishment of any frauds in relation thereto." *Id.*

33. The panel stated that because § 1001 is "highly penal" it must be construed as applicable only to material statements, that is false "statements that could affect or influence the exercise of a governmental function." 268 F.2d at 565 (quoting *Freidus v. United States*, 223 F.2d 598, 601 (D.C. Cir. 1955)). The panel found *Brandow*'s statement to be "material" because it was calculated to induce agency action or reliance. 268 F.2d at 565.

34. 455 F.2d 1109 (9th Cir. 1972).

35. *Id.* at 1110. The defendant made a false affirmative oral statement. When an FBI agent went to his home to serve him with a subpoena, *Bedore* told the agent that his name was "Tom Halstead" and that *Bedore* was not there. *Id.*

36. *Id.* The court noted that it was not concerned with those portions of § 1001 that penalize the use of false, fraudulent or fictitious writings. *Id.* at 1110 n.1. Because *Brandow* involved false written statements in an affidavit, the panel stated that it did not find the decision helpful. *Id.*

37. *Id.* at 1110. The court stated that § 1001 could not be read literally:

If . . . section 1001 were read literally, virtually any false statement, sworn or unsworn, written or oral, made to a Government employee could be penalized as a felony. Thus read, section 1001 would swallow up perjury statutes and a plethora of other federal statutes proscribing the making of false representations in respect of specific agencies and activities of Government. Extension of section 1001 to its literal breadth, however, cannot be justified by its legislative history.

Id. It concluded that *Bedore*'s statement was not the kind of statement intended to be covered by § 1101. *Id.*

38. The panel considered whether the false statement was oral or written, sworn or unsworn, requested or volunteered. *Id.* at 1111.

39. The panel considered whether the statement was related to a claim upon or against the government which could relate to property or pecuniary loss to the United

functions of the particular agency involved.⁴⁰ The panel concluded that oral, unsworn false statements given in response to questions initiated by the government and which failed to relate to a claim upon or against the government were not punishable under section 1001, unless they "substantially impaired" the functions entrusted by law to the agency involved.⁴¹

Subsequent to *Bedore*, in *United State v. Ratner*,⁴² the circuit limited *Bedore*'s "substantial impairment" test for the materiality of a false statement to situations where a law enforcement agent, such as an FBI agent, was involved.⁴³ In *United States v. Goldfine*,⁴⁴ the panel held that when the declarant makes a false statement to a regulatory agent, such as an IRS agent, the *Brandow* "intrinsic ability" test applies.⁴⁵ Similarly, in *United States v. Carrier*,⁴⁶ the panel ruled that when the declarant falsely replies to an inquiry by an administrative agent, such as a customs agent, the "intrinsic ability" test controls.⁴⁷

States. *Id.*

40. The panel decided that statements like the one made by *Bedore* would not fall within the scope of § 1001 unless they "substantially impaired" the functions entrusted by law to the agency involved. *Id.* Typical of the kind of false statements which could be held to substantially impair the investigative functions of the agency involved are "false reports of crime made to federal law enforcement agencies that may engender groundless federal investigation." *Id.*

41. *Id.*

42. *United States v. Ratner*, 464 F.2d 101 (9th Cir. 1972) (where the panel found that *Bedore* was a "policeman case" which only controlled in the "exculpatory no" situation).

43. *Id.* at 105.

44. 538 F.2d 815 (9th Cir. 1976).

45. *Goldfine* was a DEA case. The statement was made by a registered pharmacist during the course of an inspection conducted by the regulatory agency charged with the duty of investigating the manner in which the pharmacist was complying with the requirements imposed upon him by law. Applying the "intrinsic impairment" test, the court held his statement to be covered by § 1001. The majority distinguished this situation from that in *Bedore*, where the declarant's statement was unrelated to any claim of privilege from the United States. *Id.* at 821.

46. 654 F.2d 559 (9th Cir. 1981).

47. *Carrier* was a Customs case, where the panel followed *Goldfine* in using *Brandow*'s "intrinsic impairment" test. *Id.* at 561. The panel stated (1) that the declarant was claiming the privilege of entry into the United States and that that alone was enough to take the case outside of the *Bedore* decision; and (2) that the defendant's false "no" answer to any inquiry by customs could very well affect the exercise of governmental functions and agency decisions since it would have a tendency to prevent Customs from fulfilling their administrative duty to require persons entering the United States to file a currency reporting form in accordance with 31 U.S.C. § 1001. 654 F.2d at 561-62.

The rationale behind the choice of tests was that in all but the pure law enforcement cases, the declarant's false statement related to a claim upon or against the government

Subsequent to *Bedore*, the Ninth Circuit also began to follow the strict rule that section 1001 covers false affirmative statements.⁴⁸ In *United States v. Moore*,⁴⁹ where the declarant made an affirmative false statement to an administrative agent, the circuit held that any false statements made in response to a government agent's inquiry can form the basis of a section 1001 conviction.⁵⁰

4. Other Circuits:

The other circuits are divided on the issue of the scope of section 1001.⁵¹ Three categories of decisions may be discerned.

The majority of circuit's construe the statute narrowly and find some exception to the application of section 1001.⁵² The Fifth Circuit, for example, recognizes a clearly defined "exculpatory no" exception to the statute.⁵³ An "exculpatory no" is a false denial of involvement in criminal activity given in response to questions initiated by a government investigator.⁵⁴ An "exculpatory no" must satisfy four requirements in order to be considered outside the scope of section 1001:⁵⁵ the false "no" must not

and thus affected the concerns which led to the passage of § 1001. In the law enforcement situation described in *Bedore*, where the statement did not relate to a claim upon or against the government, the statement had to have a greater impact on the functions of the agency involved before it was considered punishable under § 1001. See *Goldfine*, 538 F.2d at 826 (Ferguson, D.J. dissenting).

48. The majority in *Duncan* also followed this rule. See *infra* notes 88-90 & accompanying text. But see, *Bedore*, 455 F.2d 1109 (where the defendant's false affirmative statement was not found to be within the scope of § 1001).

49. 638 F.2d 1171 (9th Cir. 1980)).

50. *Moore* was a Customs case where the defendant volunteered a false affirmative statement to Customs agents. The panel held that any affirmative statement in response to a Customs agent's inquiry can form the basis of a § 1001 conviction. *Id.* at 1175.

51. For a full discussion of this issue, see H.R. REP. No. 1396, 96th Cong., 2d Sess. 171, 179-180 (1980).

52. See generally *United States v. Erhardt*, 381 F.2d 173 (6th Cir. 1967) (where the court found that section 1001 was not meant to cover false statements that might influence the outcome of a judicial proceeding); *United States v. Stoffey*, 279 F.2d 924 (7th Cir. 1960) (where the court excluded involuntary statements from the scope of § 1001); *Gonzales v. United States*, 286 F.2d 118 (10th Cir. 1960) (where the court held that only material statements may be prosecuted under section 1001), *cert. denied*, 365 U.S. 878 (1965); *Friedman v. United States*, 374 F.2d 363 (8th Cir. 1967) (where the court found that no statements made to the FBI meet the jurisdictional requirement of § 1001).

53. See generally *United States v. Bush*, 503 F.2d 813 (5th Cir. 1974); *United States v. Schnaiderman*, 568 F.2d 1208 (5th Cir. 1978); *Paternostro v. United States*, 311 F.2d 298 (5th Cir. 1962).

54. *Paternostro*, 311 F.2d at 305, 309.

55. *Id.*

relate to any claim on the declarant's behalf against the United States;⁵⁶ the "no" answer must not relate to the privilege of obtaining or retaining government employment;⁵⁷ the circumstances surrounding the false "no" answer must have involved a definite possibility of self-incrimination;⁵⁸ and the false statement must have been sought aggressively by the government investigator.⁵⁹ The Fifth Circuit emphasized that the nature of the statement, not the type of agency involved, determines the applicability of the exculpatory no exception.⁶⁰ Even false statements made to Customs, IRS, or DEA agents are covered by the exception, so long as the statements meet the necessary requirements.⁶¹

The Second Circuit is representative of those circuits which broadly construe section 1001.⁶² In *United States v. Adler*,⁶³ where the declarant lied to an FBI agent,⁶⁴ the Second Circuit refused to exclude law enforcement agencies from the scope of section 1001.⁶⁵ The panel stated that neither the legislative history nor recent decisions suggest that Congress intended investi-

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. The panel in *Paternostro* stated:

It is our feeling that the "exculpatory no" answer without any affirmative, aggressive or overt misstatement on the part of the defendant does not come within the scope of the statute, 18 U.S.C. § 1001. Whether the Government agent to whom the answer is given be an agent of the F.B.I., a "policeman", or an Internal Revenue agent, is of little consequence. The same rule should apply to all "policemen", and therefore, we cannot approve one rule for one type of agent and another rule for an agent of another department of the same Government.

311 F.2d at 309. See also *Schnaiderman*, 568 F.2d 1208 (where the court found that a false no answer made in response to an inquiry initiated by customs respecting unreported currency was within the "exculpatory no" exception because the declarant believed that saying more than no would be incriminating).

61. *Paternostro*, 311 F.2d at 309.

62. The Ninth Circuit is included in this category.

63. 380 F.2d 917 (2d Cir. 1967).

64. *Id.* at 922.

65. *Id.* The panel stated that it did not believe that making § 1001 applicable to false statements given to the FBI would deter individuals acting in good faith from voluntarily giving information or making complaints to the FBI. *Id.* The panel noted that it would not find an exception of the statute just because the penalty for a violation of § 1001 might exceed the penalty for perjury. The matter of penalties is within the discretion of Congress. *Id.*

gative agencies to be denied the protection of section 1001.⁶⁶

The First Circuit adopted a unique approach to section 1001. In *United States v. Poutre*,⁶⁷ where the declarant lied to an IRS agent, the court declined to rule on the precise scope of section 1001.⁶⁸ The court stated that although it was possible to justify the judicial engrafting of an exception to the statute,⁶⁹ it preferred to wait for "legislative therapy" for section 1001.⁷⁰

C. THE COURT'S REASONING

The Majority

The majority in *Duncan* dealt with three issues raised by the defendant regarding the applicability of section 1001 to his false statement: (1) whether the existence of the narrower, more specific, currency reporting statute, 31 U.S.C. section 5316, which also prohibited his false statement, precluded the application of section 1001; (2) whether the false statement was "material" within the meaning of section 1001; and (3) whether the false statement came within the "exculpatory no" exception to section 1001.⁷¹

The majority refuted the defendant's contention with respect to the first issue, stating that there was no reason the defendant could not be charged and convicted under section 1001 simply because another statute was also applicable.⁷² The panel observed that criminal conduct often entails the violation of

66. *Id.*

67. 646 F.2d 685 (1st Cir. 1980). *Poutre* involved false statements made to an IRS agent which were contrary to prior sworn statements.

68. *Id.* at 686.

69. *Id.* The panel acknowledged that an exception to § 1001 could be justified by the rationale that, if literally construed, § 1001 would swallow up perjury statutes. But the panel declined to adopt an arbitrary court-drawn line between affirmative and exculpatory negative responses given to government investigators during criminal investigations. *Id.*

70. The panel stated that there was an increasing likelihood of "legislative therapy of § 1001 as the revision of Title 18 of the United States Code inches closer to final resolution." *Id.*

71. 693 F.2d at 975. The defendant had argued that the narrower and more specific currency reporting statutes, 31 U.S.C. § 1001, and 31 U.S.C. § 1058 (1983), which provides, "whoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than \$1,000 or imprisoned not more than one year, or both", precluded the application of § 1001 to his false statement. 693 F.2d at 975.

72. *Id.*

more than one statute, and if the several statutes contain different elements, the prosecutor can charge the defendant with violating any or all of the statutes.⁷³ Further, the judge can convict the defendant of violating one or more of the statutes.⁷⁴ Accordingly, the majority concluded that since the elements of section 1001 and 5316 are different, the government properly charged the defendant with violating section 1001, despite the existence of the narrower, more specific currency statute.⁷⁵

Turning to the second issue, the majority disagreed with the defendant's contention that his false statement was not material within the meaning of section 1001.⁷⁶ The majority stated that the rule in the Ninth Circuit, as articulated in *Goldfine*,⁷⁷ is that a statement satisfies the materiality requirement if it could have affected or influenced the exercise of a governmental function.⁷⁸ The majority pointed out that the court has followed this rule in prior customs decisions.⁷⁹ For example, in *Carrier*,⁸⁰ the Ninth Circuit found the defendant's false statement to be material since it had the natural tendency to prevent the customs agents from fulfilling their administrative duty to require persons to file currency reporting forms.⁸¹ The majority conceded that *Carrier*'s factual situation was different from *Duncan's* — *Carrier* was entering the country while *Duncan* was leaving⁸² — yet the majority deemed this difference as insignificant.⁸³ In both cases Customs had a duty to enforce reporting laws, and in both instances a false answer could impair Customs' ability to func-

73. *Id.* (citing *United States v. Rose*, 570 F.2d 1358 (9th Cir. 1978) (where the panel impliedly held that if the counts are not redundant, that is if the statutes violated have different elements, then the defendant may be charged and convicted of violating one or more statutes)).

74. 693 F.2d at 975.

75. *Id.* (relying on *Moore*, 638 F.2d 1171 (where the defendant was convicted of violating both §§ 1101 and 1001)).

76. 693 F.2d at 975.

77. 538 F.2d 815.

78. 693 F.2d at 975.

79. *Id.*

80. 654 F.2d 559.

81. *Id.* at 561-62.

82. 693 F.2d at 976.

83. *Id.* Note that the panel in *Carrier* found the fact that the defendant was entering the country to be very significant. The panel stated, "[h]ere, the appellant was claiming the privilege of entry into the United States. This alone is enough to take this case outside of the *Bedore* decision." 654 F.2d at 561.

tion.⁸⁴ Therefore, the majority found that Duncan's false statement was material within the meaning of section 1001.⁸⁵

With regard to the "exculpatory no" issue, the majority rejected Duncan's contention that his statement fell within the "exculpatory no" exception.⁸⁶ First, the majority questioned the validity of the "exculpatory no" exception within the Ninth Circuit.⁸⁷ Second, the majority explained that since Duncan made a false affirmative statement, the statement does not come within the exception⁸⁸ under Ninth Circuit precedent. The majority stated that the Ninth Circuit follows the rule enunciated in *Moore*,⁸⁹ that any affirmative false statement in response to a Customs agent's inquiry can form the basis of a section 1001 conviction.⁹⁰ Since Duncan did more than merely say no, the majority concluded that the statements were sufficient to form the basis of a section 1001 conviction.⁹¹

The Dissent

In dissent, Judge Fletcher argued that section 1001 did not apply to the defendant's false statement.⁹² The dissent began its discussion by comparing the situation in *Duncan* to that in *Bedore*.⁹³ The dissent maintained that the defendant's false statement was similar to Bedore's in terms of materiality, moral culpability, and potential for misleading governmental officials.⁹⁴ Neither statement related to a claim of privilege from the United States or to a claim against the government.⁹⁵ Both were oral, unsworn responses to inquiries by government investigators.⁹⁶ Due to the strong similarities between the statements, the dissent argued that the majority should have followed the

84. 693 F.2d at 976.

85. *Id.*

86. *Id.*

87. *Id.* (citing *Moore*, 638 F.2d 1171).

88. 693 F.2d at 976.

89. 638 F.2d 1171.

90. 693 F.2d at 976.

91. *Id.*

92. *Id.* at 984. Judge Fletcher's dissent characterized the § 1001 issue to be, "whether 18 U.S.C. § 1001 was ever intended by Congress to apply to the appellant's false statement in the first place." *Id.* at 985.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

Bedore approach to determine whether a false statement falls within the scope of section 1001.⁹⁷

In making her determination, Judge Fletcher scrutinized the structure of the Currency Reporting Act and found that Congress did not intend for section 1001 to apply to false statements regarding unreported currency.⁹⁸ Rather, such statements were meant to be penalized under the Currency Act.⁹⁹ The dissent explained that the Currency Reporting Act is divided into two parts: Section 1101 sets out the reporting requirements,¹⁰⁰ while section 1058 contains the sanctions for violation of the requirements.¹⁰¹ The dissent argued that if Congress had intended section 1001 to apply to persons who violated section 5316, it would not have enacted a statute containing separate and specific penalties for the violations.¹⁰²

Additionally, the dissent pointed out that the statutory situation in *Duncan* is different from that in *Gilliland*,¹⁰³ where the Supreme Court held that section 1001 applied to written violations of the Hot Oil Act, even though the Act carried its own lesser penalty.¹⁰⁴ The dissent distinguished the two cases on the

97. Judge Fletcher stated:

Plainly, the statement used to convict Duncan in this case did not threaten to "substantially impair the basic functions entrusted by law" to the Customs Service. The Customs Service did not rely in any way upon the contents of the statements in question Rather, Duncan's statements were elicited in response to formal questions preceding a search that the agents evidently intended to perform no matter what the response.

Id. at 985.

98. *Id.*

99. Judge Fletcher observed:

The only conceivable, but basically implausible, reason why Congress might have created the lesser penalty and still intended some play for section 1001, would be that Congress intended to distinguish between a simple failure to report and a currency reporting violation that is accomplished by affirmative misrepresentations, allowing punishment of the latter much more harshly than a 'mere' failure to report. This hypothesis finds no support in the legislative history, however.

Id. at 985-86.

100. See *supra* note 9 for text of § 1001.

101. See *supra* note 72 for text of § 1058.

102. 693 F.2d at 985.

103. 312 U.S. 86 (1941).

104. 693 F.2d at 986-87 (citing *Gilliland*, *supra* note 22).

basis of section 1001's legislative history, which makes clear that section 1001 was meant to apply the Hot Oil Act violations, but does not indicate that section 1001 was intended as a sanction for currency reporting violations.¹⁰⁵

The dissent concluded that section 1001 should be interpreted narrowly.¹⁰⁶ It should not be used as a sanction against conduct already proscribed, unless the expansion is supported by legislative history. Since there is nothing in the legislative history to show that Congress intended section 1001 to cover the *Duncan* situation, the dissent determined that the defendant's false statements were outside the scope of section 1001.¹⁰⁷

D. CRITIQUE

In *Duncan*, the Ninth Circuit departed from previous case law regarding the application of section 1001 to false statements made during criminal investigations. The majority held that the sole question for determining the materiality of a false statement is whether the statement could have affected or influenced a governmental function.¹⁰⁸ The Circuit considered unimportant the nature of the statement and the statement's relation to a claim upon or against the United States.¹⁰⁹

The Ninth Circuit's present approach to section 1001 is unsupported by the statute's legislative history. The original intent of the false statements statute was to prevent pecuniary or property loss to the government resulting from false statements and related false claims made upon or against the United States.¹¹⁰ Yet, in *Duncan*, the panel found "insignificant" the fact that the defendant's false statement failed to relate to a claim upon or against the United States.¹¹¹ The 1934 amendment indicated that Congress also intended the statute to protect the regulatory schemes of government from the perversion or frustration which

105. The dissent also noted that the cases can be distinguished on the grounds that in *Gilliland* the false statement was written, while in *Duncan* the statement was oral. 693 F.2d at 986-87.

106. *Id.* at 987.

107. *Id.*

108. See *supra* notes 76-78 & accompanying text.

109. See *supra* notes 82-83 & accompanying text.

110. See *supra* note 17 & accompanying text.

111. See *supra* notes 82-83 & accompanying text.

might result from deceptive practices.¹¹² Yet the panel in *Duncan* considered of no import the fact that the government agents were investigators and that the defendant's false statement did not impair the agents' ability to continue their investigation.¹¹³

Here, the defendant's false statement should not have been considered punishable under section 1001. The false statement was made during a nonspecific criminal investigation initiated by special Customs agents. The statement was not unrelated either to a claim of privilege from the government or to a claim against the government, and did not substantially impair the investigative functions of the agents involved.

As soon as the agents noticed the defendant at the departure gate at the Los Angeles International Airport, they began a criminal investigation based on the fact that he was traveling alone, not talking to anyone and appeared to be looking for someone. The agents used the currency declaration requirements of section 1101 to create a situation in which to question and search the defendant. That is, the agents were not engaged in fulfilling an administrative duty of requiring persons who leave the United States to file a currency reporting form in accordance with section 1101. Rather, the agents focused on the currency statute solely to generate an opportunity to conduct a criminal investigation, interrogation, and search of the defendant.

The defendant's false statement did not interfere with the investigative functions of the customs agents. The statement did not change the outcome of the investigation. It did not affect the agents' right to continue their investigation, nor did it change their ability to act on information received from the defendant. The statement was not a voluntarily given falsehood intended to provoke agency action, nor did it send the agents on a groundless investigation. Rather, the defendant's statement was elicited in response to formal questions preceding a search that the agents intended to perform regardless of the response.

The panel should have followed the *Bedore* approach to the

112. See *supra* notes 20 & accompanying text.

113. 693 F.2d at 985.

application of section 1001 to false statements made during criminal investigations. Under *Bedore's* 'substantial impairment' test, the defendant's false statement would not have been considered sufficient to form the basis of a section 1001 conviction. The defendant's false statement, similar to that of the defendant in *Bedore*, was an oral, unsworn, response to questions initiated by government agents. Since the defendant was not entering the country, the statement failed to relate to a claim against the government of the privilege of entry. Further, since the agents apparently intended to continue their investigation of the defendant regardless of his response to their questions, his false statement did not substantially impair their investigative function. Accordingly, the defendant's false statement should not have been found punishable under section 1001. Congress did not intend the defendant's statement to fall within the scope of the statute. The statement did not implicate any of the original concerns which led to the passage of section 1001, to wit, it failed to relate to a claim upon or against the United States and did not frustrate the functions of the agents involved.

E. CONCLUSION

Under the *Duncan* holding, virtually any false statement made to a government agent is considered to be within the scope of the statute. Mere denials of involvement in criminal activity made to investigative agents which would not result in pecuniary or property loss to the United States and which do not threaten to impair the functions of the agency involved are punishable by a \$10,000 fine or a five-year prison term. The Ninth Circuit's approach is unreasonably severe in light of the statute's objective and will continue to result in unwarranted convictions and unfair punishments.

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THE FOURTH AMENDMENT AND FORFEITURE PROCEEDINGS: IMBALANCE IN THE LAW?

A. INTRODUCTION

In *United States v. One 1977 Mercedes Benz*,¹ the Ninth Circuit held that the owner of an automobile loaned to another had no constitutional right to protest an unlawful search of that vehicle.² The court found that the owner did not possess a reasonable expectation of privacy in the automobile solely on the basis of ownership.³

On the evening of April 2, 1982, claimant Aimee Webb loaned her 1977 Mercedes Benz to Thomas Reese.⁴ While operating the vehicle, Reese was stopped by two Los Angeles police officers investigating the absence of license plates on the vehicle.⁵ After Reese was out of the vehicle, an unlawful search of the latter uncovered a package containing cocaine.⁶ Reese was arrested,⁷ but in the ensuing State prosecution, the evidence was suppressed as unlawfully seized, and the charges against him were dismissed.⁸

Upon arriving at the scene, Webb told the officers that she owned the car and that Reese had permission to use it. Webb denied having any knowledge of the narcotics in the Mercedes,⁹ and the officers then released the car to her.¹⁰

On the following day, however, Los Angeles police seized the Mercedes.¹¹ The police later released the vehicle to the Drug Enforcement Agency,¹² which initiated forfeiture proceedings against Webb.¹³ The government was granted summary judg-

1. 708 F.2d 444 (9th Cir. 1983) (per Boochever, C.J.; the other panel members were Wright, and Kennedy, JJ.).

2. *Id.* at 449.

3. *Id.* at 449-50.

4. *Id.* at 446.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 447 n.2.

9. *Id.* at 446.

10. *Id.*

11. *Id.*

12. *Id.*

13. Comprehensive Drug Prevention and Control Act of 1970, § 511(c), 21 U.S.C. §

ment.¹⁴ On appeal to the Ninth Circuit court, Webb contended¹⁵ that the evidence unlawfully seized should be excluded from the forfeiture proceeding.

B. BACKGROUND

1. *Legitimate Expectation of Privacy*

Since *Mapp v. Ohio*,¹⁶ where the Supreme Court extended application of the exclusionary rule to state prosecutions, the Court has attempted to define the scope of the rule's application.¹⁷ The Court, in defining the extent of the fourth amendment in the landmark decision *Katz v. United States*,¹⁸ determined that the fourth amendment protects people, not places.¹⁹ In excluding the evidence obtained through the government's use of an electronic listening device which monitored petitioner's telephone conversation, the Court noted that the proper focus in a fourth amendment inquiry is the privacy expectation of the individual rather than his or her property rights.²⁰

In *Alderman v. United States*,²¹ where petitioner urged suppression of evidence obtained through unlawful government eavesdropping of numerous telephone conversations, the Court held that the fourth amendment was a *personal right* which could not be vicariously asserted.²² Petitioner, who was neither a participant in the monitored conversations nor the owner of the premises where the conversations occurred, had no "standing" to

881(d) (1976) & (Supp. V. 1981), allows the initiation of forfeiture proceedings when the government has shown probable cause sufficient to warrant a reasonable belief that the vehicle was used to transport contraband. 708 F.2d at 446, 447.

14. *Id.* at 446.

15. *Id.*

16. 367 U.S. 643 (1961).

17. See *Katz v. United States*, 389 U.S. 347 (1967); *Alderman v. United States*, 394 U.S. 165 (1969); *Rakas v. Illinois*, 439 U.S. 128 (1978).

18. *Katz*, 389 U.S. 347.

19. *Id.* at 351.

20. *Id.* at 351-352. In *Katz* the Court found that any evidence as to whether the government had physically trespassed while monitoring petitioner's phone conversation was irrelevant. *Id.* at 352. The significant factor was that Katz went into the public phone booth and shut the door, thereby expressing his intention to keep his telephone conversation from the "uninvited ear." *Id.* at 352.

21. 394 U.S. 165 (1968).

22. *Id.* at 171-175.

object to the government's unlawful activity.²³

In *Rakas v. Illinois*,²⁴ where petitioner protested the search of an automobile in which he was a passenger, the Court held that the proper inquiry to determine whether an individual had experienced a fourth amendment violation²⁵ was whether that person had a "legitimate expectation of privacy"²⁶ in the thing or area searched.²⁷ The *Rakas* court stated that although property interests alone are insufficient to establish a reasonable expectation of privacy,²⁸ the Supreme Court had not altogether abandoned the use of property concepts in determining the presence or absence of privacy interests protected by the fourth amendment.²⁹

The Court later in *Rawlings v. Kentucky*,³⁰ described the

23. *Id.* In reaching its decision not to extend application of the exclusionary rule other than to those whose *personal* fourth amendment rights were violated, the Court employed a balancing test. *Id.* at 174. The Court considered the deterrence aim of the exclusionary rule to be a major factor in this balancing test. *Id.* The Court, however, felt that the additional benefits of extending the rule did not justify "further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Id.* at 175. The court thus distinguished those who had personally experienced an unconstitutional search or seizure and then had evidence obtained as a result of this act used against them at trial from those who had this same evidence used against them at trial, but who had not personally experienced an unconstitutional search or seizure. *Id.* For "constitutional purposes" the Court found a "substantial difference" between these two cases. *Id.* at 174. Finally, the Court noted that the exclusionary rule was judicially created and left it up to the legislative branch to expand fourth amendment protection. *Id.* at 175.

24. 439 U.S. 128.

25. The inquiry regarding whether a party may assert a fourth amendment violation in the past has been addressed under the rubric of "standing." However, "standing" is now to be subsumed within the larger question of whether petitioner's fourth amendment rights have been violated. *Id.* at 139.

26. *Id.* at 143. The phrase "legitimate expectation of privacy" is taken from Justice Harlan's concurring opinion in *Katz*: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first, that a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 347.

27. *Rakas*, 439 U.S. at 143.

28. *Id.* at 143 n.12.

29. *Id.* In *Rakas*, the court discussed their decision in *Alderman* as an example of the role property concepts should play in any legitimate expectation of privacy determination. In *Alderman* the Court noted that an individual's property interest in his home was so great as to allow him to object to electronic surveillance of conversations emanating from his home, even though he himself was not a party to the conversation. *Id.*; See 394 U.S. at 176.

30. 448 U.S. 98 (1980).

Rakas analysis as a totality of the circumstances test,³¹ in which a number of factors were to be considered³² such as ownership, the right to exclude others, and the relationship between the owner and the person in possession of the object searched.³³ In *Rawlings*, the police illegally searched the purse of the defendant's companion, finding drugs allegedly belonging to the defendant. Applying the "totality of the circumstances", the Court found that the defendant Rawlings had no legitimate expectation of privacy in his friend's purse, and therefore had no standing to contest the illegal search.³⁴

Finally, in *United States v. Salvucci*,³⁵ where petitioners were indicted for unlawful possession of stolen mail, the Court found that while property rights were a factor to be considered, ownership of the property was not determinative.³⁶ Rather than an analysis based on traditional property concepts, the Court found the more pertinent inquiry to be the right to exclude others and any precautions taken to maintain a privacy interest.³⁷

2. *Diminished Expectation of Privacy in the Automobile*

In *Cady v. Dumbroski*,³⁸ the Supreme Court held that automobiles are considered "effects" within the meaning of the fourth amendment, and therefore protected from unreasonable searches and seizures.³⁹ However, in *Chambers v. Maroney*,⁴⁰ the Court held that a different, lesser, standard of "reasonableness" should apply to automobile searches than used in a home or office.⁴¹ The automobile's inherent mobility created circumstances

31. *Id.* at 104.

32. *Id.* at 105.

33. *Id.* at 104-106.

34. *Id.*

35. 448 U.S. 83 (1980).

36. *Id.* at 91.

37. *Id.*

38. *Cady v. Dumbroski*, 413 U.S. 433 (1973). The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." *Id.* at 439. The Court's classification of automobiles as "effects" requires that a government search of an automobile, without consent, is "unreasonable" unless it has been authorized by a valid search warrant.

39. *Id.*

40. 399 U.S. 42 (1970).

41. *Id.* at 48 (citing *Carroll v. United States*, 267 U.S. 132, 152-155 (1925)). See also

of such exigency that, as a practical necessity, made vigorous enforcement of the warrant requirement impossible.⁴² The court concluded that because automobiles and similar objects⁴³ were mobile, a different treatment was warranted.⁴⁴

Along with this element of inherent mobility, the Court also pointed out, in *South Dakota v. Opperman*,⁴⁵ that the expectation of privacy with respect to one's automobile is significantly less than the expectation in one's home or office.⁴⁶ In *Cardwell v. Lewis*,⁴⁷ the Court explained that there is a lesser expectation of privacy in the automobile because it functions mainly as transportation, and it rarely serves as one's residence or as a repository of personal effects.⁴⁸ Furthermore, it is driven on public thoroughfares where both its occupants and its contents are in plain view.⁴⁹

The Court additionally has pointed to other factors which reduce an automobile's privacy. States require all drivers to be licensed,⁵⁰ and both states and localities enact detailed codes regulating ownership and operation of vehicles.⁵¹ Furthermore, law enforcement officials are brought into more frequent contact with automobiles than with homes or other geographically fixed areas.⁵² Automobiles, unlike homes, also must undergo periodic

Preston v. United States, 376 U.S. 364, 366-367 (1964).

42. *Chambers*, 399 U.S. at 51.

43. In *Carrol* the Court noted that ships, motorboats, and wagons would be treated similarly. 267 U.S. at 152-155.

44. *Id.* The basic reason for the different treatment stems from the opportunity to move the object out of the locality or jurisdiction in which a warrant must be sought. *Id.* at 153. See also *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974).

45. 428 U.S. 364 (1976). In *Opperman*, the Court upheld an inventory search of petitioner's car after it had been impounded for multiple parking violations. The police found a bag of marijuana which petitioner unsuccessfully attempted to suppress. *Id.* at 366.

46. *Id.* at 367.

47. 417 U.S. 583 (1974). In *Lewis*, the Court upheld a warrantless search of petitioner's automobile while petitioner was in custody and while the automobile was in a public parking lot. *Id.* at 590.

48. *Id.*

49. *Id.*

50. *Cady v. Dumbroski*, 413 U.S. at 368.

51. *South Dakota v. Opperman*, 428 U.S. at 367-368.

52. *Id.* In a footnote the Court notes that two of its decisions, *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967) required a warrant to effect an administrative entry into and inspection of private dwellings or commercial premises to ascertain health or safety violations. 428 U.S. 364, 367 n.2 In con-

official inspection and are often taken into police custody in the interests of public safety.⁵³ These factors, taken together, according to the Court in *Cardwell v. Lewis*,⁵⁴ justified the application of a less stringent warrant requirement to automobiles.⁵⁵

3. Circuit Court Application

In a prosecution for conspiracy to smuggle marijuana, the Fifth Circuit held in *United States v. Dyar*,⁵⁶ that no legitimate expectation of privacy⁵⁷ in a searched airplane exists solely on the basis of ownership.⁵⁸ The *Dyar* Court noted that even if petitioner could show an ownership interest sufficient to satisfy "traditional property concepts" in order to establish a legitimate expectation of privacy he must also demonstrate a cognizable privacy interest in the place searched or the thing seized.⁵⁹ Applying the reasoning in *Dyar*, the Fourth,⁶⁰ Eighth,⁶¹ Ninth,⁶²

trast, this procedure has never been held applicable to automobile inspections for safety purposes. *Id.* at 367-68.

53. *Id.*

54. See *Carrol*, 267 U.S. 132.

55. 417 U.S. at 590.

56. 574 F.2d 1385 (5th Cir.), *cert. denied*, 439 U.S. 982 (1978).

57. Prior to *Rakas*, the Fifth Circuit had adopted the legitimate expectation of privacy language from *Katz* as the proper test to determine whether petitioner had experienced a fourth amendment violation. *United States v. Nunn*, 525 F.2d 958, 959 (5th Cir. 1976). See also *United States v. Mendoza*, 500 F.2d 347 (5th Cir. 1972); *United States v. McConnell*, 500 F.2d 347 (5th Cir.), *cert. denied*, 420 U.S. 946 (1971); *United States v. Hunt*, 505 F.2d 931 (5th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975).

58. *United States v. Dyar*, 574 F.2d at 1385.

59. *Id.* at 1390. The *Dyar* court found that any personal privacy interest that petitioner had through his ownership was abandoned when he gave possession over to another. *Id.* Post *Rakas* decisions by the Fifth Circuit have reaffirmed the *Dyar* holding. See *United States v. Vicknair*, 610 F.2d 372 (5th Cir. 1980), *cert. denied*, 449 U.S. 823 (1981); *United States v. Meyer*, 656 F.2d 979 (5th Cir. 1981); *United States v. Dunn*, 674 F.2d 1093 (5th Cir. 1982); *United States v. Parks*, 684 F.2d 1078 (5th Cir. 1982).

60. In *United States v. Ramapuram*, 632 F.2d 1149 (4th Cir. 1980) (where petitioner was protesting a warrantless search of his "junkie" car) *cert. denied*, 450 U.S. 1030 (1981), the Fourth Circuit noted that ownership alone is not enough to establish a *Rakas* legitimate expectation of privacy. *Id.* at 1154-1155. Rather, the *Rakas* inquiry was determined by a totality of the circumstances. See also *United States v. Hargrove*, 647 F.2d 411, 412-413 (4th Cir. 1981); *United States v. Dickerson*, 655 F.2d 559, 561 (4th Cir. 1981); *United States v. Bellina*, 665 F.2d 1335, 1339-1340 (4th Cir. 1981).

61. In *United States v. Kelly*, 529 F.2d 1365 (8th Cir. 1978) (where petitioner was found to have legitimate expectation of privacy in a mailed package), the Eighth Circuit pointed out that a bare assertion of a property interest without a supporting expectation of privacy would not give rise to a cognizable fourth amendment claim. *Id.* at 1369. But see *United States v. Bruneau*, 594 F.2d 1190, 1193 n.3 (8th Cir.) *cert. denied*, 444 U.S. 847 (1979).

Tenth⁶³ and Eleventh⁶⁴ Circuits similarly have held ownership alone as insufficient to establish a privacy interest.

In *United States v. Heydel*,⁶⁵ where petitioner was found to have a legitimate expectation of privacy in his parent's home, the Fifth Circuit stated that no one circumstance was "talismanic" to the *Rakas* inquiry.⁶⁶ Rather, the determination as to whether petitioner has sufficiently demonstrated the *Rakas* legitimate expectation of privacy was to be made from the totality of the circumstances of the case.⁶⁷ Factors the Fifth Circuit considered other than ownership are: petitioner's possessory interest in the place searched or thing seized, the right to exclude others, prior use of the area searched or property seized, legitimate presence in the area searched and a subjective expectation of privacy.⁶⁸

In *United States v. Dall*,⁶⁹ where petitioner protested the

62. In *United States v. Medina-Verdugo*, 637 F.2d 649 (9th Cir. 1979) (where petitioner was contesting the search of a friend's purse), the Ninth Circuit noted that ownership is but one factor to be considered when determining an individual's legitimate expectation of privacy. *Id.* at 652. See also *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982); *United States v. One 56 Foot Yacht Named Tahuma*, 702 F.2d 1276 (9th Cir. 1983).

63. In *United States v. Rios*, 611 F.2d 1335 (10th Cir. 1979), *cert. denied*, 452 U.S. 918 (1981), the Tenth Circuit held that petitioner's bare legal ownership of a mobile home was insufficient to create a *Rakas* legitimate expectation of privacy. *Id.* at 1345. See also *United States v. Montgomery*, 620 F.2d 753, 759 (10th Cir.), *cert. denied*, 449 U.S. 882 (1980), *United States v. \$3,799.00 in United States Currency*, 684 F.2d 674, 678 (10th Cir. 1982); *United States v. Karo*, 710 F.2d 1433, 1440-1441 (10th Cir. 1983).

64. In *United States v. Friere*, 710 F.2d 1515 (11th Cir. 1983) (where petitioner was found to have a legitimate expectation of privacy in his briefcase), the Eleventh Circuit noted that "mere ownership was not the talisman for Fourth Amendment jurisprudence." *Id.* at 1519. However, the court went on to say "it is a bright star by which courts are guided when the place invaded enjoys universal acceptance as a haven of privacy, such as one's home." *Id.*; See also *United States v. McCulley*, 673 F.2d 346, 352 (11th Cir. 1982); *United States v. Hawkins*, 681 F.2d 1343, 1345 (11th Cir.), *cert. denied*, 103 S.Ct. 354 (1982); *United States v. Torres*, 705 F.2d 1287, 1293-1294 (11th Cir. 1983).

65. 649 F.2d 1152 (5th Cir. 1981), *cert. denied*, 455 U.S. 1022 (1982).

66. *Id.* at 1154-1155.

67. *Id.*

68. *Id.* at 1154-1155. For other circuits' enunciations of these factors see *United States v. Locham*, 674 F.2d 960, 965 (1st Cir. 1980); *United States v. Sanchez*, 635 F.2d 47, 64 (2nd Cir. 1980); *United States v. Ramapuram*, 632 F.2d at 1155-1156; *United States v. Bentley*, 706 F.2d 1498, 1505 (8th Cir. 1983); *United States v. Perez*, 689 F.2d at 1335; *United States v. Karo*, 710 F.2d at 1440-1441; *United States v. Friere*, 710 F.2d at 1518-1519.

69. 608 F.2d 910 (1st Cir. 1979), *cert. denied*, 445 U.S. 918 (1980).

search of the locked camper cap on his pickup truck, the First Circuit held that mere ownership of the pickup truck was insufficient to establish a legitimate expectation of privacy.⁷⁰ In *Dall*, the court pointed out that petitioner's ownership claim was weakened by the diminished expectation of privacy surrounding the automobile,⁷¹ and reasoned that this claim was more attenuated since petitioner relinquished possession of the truck.⁷² Therefore, while ownership alone would not have been determinative, the attenuation surrounding petitioner's ownership claim contributed to defeat petitioner's claim of a *Rakas* legitimate expectation of privacy.⁷³

C. THE COURT'S REASONING

In *One 1977 Mercedes Benz*, the court focused on petitioner's fourth amendment assertions:⁷⁴ Did Webb, the owner of the Mercedes suffer a fourth amendment intrusion⁷⁵ when the automobile was unlawfully⁷⁶ searched while in another's possession?⁷⁷

The court, in applying the *Rakas* test, inquired as to whether the unlawful search of Webb's automobile violated any legitimate expectation of privacy she may have had in the Mercedes while it was loaned to Reese.⁷⁸

70. *Id.* at 914.

71. *Id.* at 914-915.

72. *Id.* at 915.

73. *Id.* Subsequent First Circuit decisions have reaffirmed *Dall*. In *United States v. Smith*, 621 F.2d 483 (2nd Cir.), *cert. denied*, 449 U.S. 1086 (1980), the Second Circuit found that petitioners did not have any reasonable expectation of privacy in the trunk of an automobile that they were driving. *Id.* at 486-488. While applying the *Rakas* test, the *Smith* court pointed out that an individual's expectation of privacy in an automobile was significantly lower than his expectation of privacy in a residence. *Id.*

74. Petitioner Webb also raised a number of other issues in her appeal. She contended that forfeiture of her Mercedes was improper because it was not properly seized by either the state or the federal authorities. *One 1977 Mercedes Benz*, 708 F.2d at 450. In conjunction with her unlawful seizure assertions, Webb also raised a jurisdictional issue. *Id.* Citing Ninth Circuit precedent, the court refused to decide the merits of these claims because they became irrelevant in light of the court's ruling that Webb had suffered no personal fourth amendment violation. *Id.* Therefore, the sole issue decided by the court was whether Webb had suffered a personal fourth amendment violation. *Id.*

75. *Id.* at 448 n.3. See also *Rakas*, 439 U.S. at 139.

76. *Id.* at 449-450.

77. *Id.* at 448.

78. *Id.*

The court observed that the Supreme Court has found automobiles to be surrounded by a diminished expectation of privacy.⁷⁹ The court, citing *Cardwell v. Lewis*,⁸⁰ noted that because a major function of an automobile is transportation, it does not carry the same expectation of privacy that a house or other fixed objects would.⁸¹ Additionally, the court relying on *South Dakota v. Opperman*,⁸² noted that due to the numerous regulatory laws concerning automobiles, police officers may justifiably intrude further with regard to automobiles than with regard to houses.⁸³ Relying on these and other decisions,⁸⁴ the Ninth Circuit concluded that the automobile is surrounded by a diminished expectation of privacy.⁸⁵

Next, the court examined Supreme Court decisions relating to whether ownership alone would confer to petitioner Webb a *Rakas* legitimate expectation of privacy.⁸⁶ The court pointed out that in *Salvucci* and *Rawlings* property ownership, although not determinative, was found to be a relevant factor in creating a legitimate expectation of privacy.⁸⁷ While under *Rakas*, expectations of privacy may be legitimized by references to real or personal property concepts,⁸⁸ the court found that the strength of any of these arguments depended on the circumstances of each case.⁸⁹ The right to exclude others and efforts taken to protect a privacy interest, for example, represent circumstances that would heighten an individual's expectation of privacy.⁹⁰

The court noted that in *Dall*, the First Circuit held the petitioner had no legitimate expectation of privacy in a truck which he loaned to another.⁹¹ The court also noted that it was unnecessary to go as far as *Dall*, since unlike *Dall*, no locked portions of

79. *Id.*

80. 417 U.S. 583 (1974).

81. 708 F.2d at 448.

82. 428 U.S. 364 (1976).

83. 708 F.2d at 448.

84. *Cady v. Dumbroski*, 413 U.S. 433 (1973).

85. 708 F.2d 448.

86. *Id.* at 449.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

the automobile were involved in the search.⁹²

Similarly, the court noted that in *Dyar*, the Fifth Circuit held that although the defendants asserted a leasehold interest in an airplane sufficient to create a traditional property right, they had abandoned any expectation of privacy when they gave possession of the plane to the pilot.⁹³

The court set forth what it considered the relevant factors to Webb's claim: Webb voluntarily turned her car over to Reese for his exclusive use, she did not take any precautions to safeguard any privacy interest she may have had in the Mercedes, and the police officer intruded only into the passenger compartment where Reese could have invited anyone.⁹⁴ Based on these factors the court held that Webb waived her expectation of privacy and could not now protest the search of her Mercedes.⁹⁵

Recognizing the harshness of their decision, the court pointed out that Webb was not precluded from other means of redress, such as a claim for mitigation or a constitutional objection.⁹⁶

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 449-450.

96. *Id.* at 451 n.6. The court stated:

[The result of the decision] may seem unduly harsh as applied to an innocent owner who lends property to another unaware that it will be used in violation of federal law. As we have seen that owner may be unable to protest either the unlawful seizure of the property or the evidence necessary to make a case for forfeiture.

Id.

The court suggested two potential methods of remedy. *Id.* First the court pointed to dicta in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), which suggested a possible constitutional claim by an owner who could prove not only that he was uninvolved, but also that he had done all that he reasonably could to prevent the proscribed use of his property. *Id.* at 689.

The second suggested method of redress suggested by the court concerned procedures for remission and mitigation contained in 19 U.S.C. § 1618 (1976). See 21 U.S.C. § 881(d) (Supp. V. 1981). Under this provision forfeiture may be remitted or mitigated if the owner acted without willful negligence or without an intention to violate the law. The regulations promulgated to implement § 1618 state that, if the property subject to forfeiture was in the possession of another who was responsible for the violation of law bringing about the forfeiture, the owner must produce evidence explaining how the property came in the possession of the other party, and showing that, prior to parting with the property, the owner did not know or have reasonable cause to believe that the prop-

D. Critique

The Ninth Circuit's application of the *Rakas* analysis to Webb's appeal stands on solid precedential ground. This decision, like both the First Circuit's *Dall* and the Fifth Circuit's *Dyar* decisions, is an appropriate application of the Supreme Court's position as expressed in *Rakas*, *Rawlings*, and *Salvucci*; the cases which narrowed and refined traditional "standing" analysis. This process of refinement was the inevitable result of the Supreme Court's *Alderman* decision, where the Court, after utilizing a balancing test, chose to restrict application of the exclusionary rule to those who *personally* experienced a fourth amendment violation.

Like *Alderman*, the Ninth Circuit classified Webb as one who was merely aggrieved by the introduction of damaging evidence. As Webb was not directly subjected to unlawful policy activity, her claims to privacy in her automobile while it was loaned to another seem rather remote. In her appeal Webb demonstrated no effort to maintain a reasonable expectation of privacy in her Mercedes. No locked portions of the vehicle were involved over which Webb retained exclusive authority. Given the diminished expectation of privacy that has traditionally surrounded the automobile, the court's decision denying Webb her *Rakas* privacy claim was proper.

While the Ninth Circuit's holding is consistent with both *Dall* and *Dyar*, these decisions can be distinguished from the principal case in that they both involved petitioners who were criminal defendants. Webb, who merely lent her car to another, stands to lose her automobile for an illegal act of which she was no part. This injustice emanates from the forfeiture statute which enables the government to use evidence obtained in an unlawful manner while denying the aggrieved individuals the right to protest its use. Hence, the Ninth Circuit's decision illustrates the problem of applying fourth amendment law to forfeiture proceedings.

erty would be used in violation of the law or that the violator had a criminal record or a general reputation for commercial crime. 19 C.F.R. § 171.13(a) (1982).

The court, recognizing the injustice arising out of forfeiture of an automobile belonging to someone innocent of criminal wrongdoing, pointed out in a footnote the alternative means of redress potentially available to Webb. First, the court mentioned a possible constitutional claim that had been suggested by the Supreme Court in *dicta*. However, both the Supreme Court and the Ninth Circuit failed to define this possible claim other than to suggest its potential existence. Secondly, the court suggested statutorily prescribed means of redress. However, serious questions remain as to whether Webb would qualify for this remedy because the statutory procedure may require Webb to show that prior to lending her car to Reese she did not know that he had a criminal record. Enforcement of this requirement would in effect penalize Webb for her association with a person with a criminal record. Furthermore, even if the court's suggested alternatives were found available to Webb, the time and expenses she would incur pursuing them may be prohibitive.

The application of fourth amendment standards to the forfeiture proceeding in the instant case can be faulted on grounds of both authority and fairness. Unlike the situations involved in other circuit decisions, the petitioner was neither accused of nor charged with any unlawful conduct with respect to the events which resulted in the seizure of her automobile. This result suggests a fundamental unfairness in forfeiture law. After all, if a court applying the present standard must excuse the apparent inequity of its holding by suggesting some nebulous alternative methods of redress, then the law is lacking a desired equilibrium.

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UNITED STATES V. MORENO: HOMES EXPANDED UNDER THE KNOCK AND ANNOUNCE DOCTRINE

A. INTRODUCTION

In *United States v. Moreno*¹ the Ninth Circuit held that the knock and announce provisions of 18 U.S.C. § 3109² prohibited officers from forcibly entering an alcove adjacent to the front door of the defendant's apartment without first knocking and announcing their purpose at the entrance to the alcove.³

The defendant resided in a multi-unit apartment building.⁴ A solid front door leading to the interior of the defendant's apartment was recessed six feet from a common hallway, creating an alcove measuring approximately thirty-six square feet.⁵ An ornamental wrought iron gate extending to the perimeter of the entrance to the alcove divided the alcove from the common hallway.⁶ The gate remained locked and only residents of the

1. 701 F.2d 815 (9th Cir. 1983) (per Hug, J.; the other panel members were Ely, and Conby, JJ.).

2. The statute provides:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109 (1976).

3. 701 F.2d at 817.

4. *Id.* at 816. The defendant's apartment was one of seventy-six similar apartments in the building. *Id.* The building itself was accessible via two glass-doored main entry ways situated at either end of the building. Brief for Appellee at 10 n.5, *United States v. Moreno*, 701 F.2d 815. These entrances remained locked, and only residents of the building had key access. *Id.* Although the officers gained entry through one of these main entrances without complying with 18 U.S.C. § 3109, no contention was made by the defendant that that particular entry by the officers violated the statute. 701 F.2d at 816. Inside the building, common open-air hallways led to the various apartments. *Id.* at 815. The defendant's apartment shared one of these common hallways with two other apartments. *Id.*

5. 701 F.2d at 816.

6. *Id.* The ornamental gate extended the width of the entrance, and extended to within several inches of both the floor and ceiling at the entrance to the alcove. Brief for Appellee at 11, *United States v. Moreno*, 701 F.2d 815. It was not possible to enter the defendant's apartment without passing through the gate. 701 F.2d at 816. The entry-way to the defendant's apartment was not unique from other apartment entry-ways in the building. Brief for Appellee at 12, *United States v. Moreno*, 701 F.2d 815. All apartments in the building had a similar ornamental iron gate leading to an alcove and an inner solid door. *Id.*

defendant's apartment had keys.⁷ Nonresidents gained access to the alcove only by ringing a buzzer located at the side of the gate.⁸ Thus, the alcove was exclusively available to residents of the defendant's apartment.⁹

Federal and local officers, in executing a search warrant of the defendant's apartment, arrived at the ornamental iron gate, and without knocking or giving notice to any occupant of the apartment, pried the gate open, entered the alcove, and approached the solid door of the apartment.¹⁰ One of the officers knocked on the solid door, announced that he was a police officer with a search warrant and demanded entry.¹¹ A co-defendant admitted the officers, and the subsequent search uncovered cocaine, cocaine paraphernalia, and firearms.¹²

At trial the defendant sought to suppress the evidence seized in the search, contending that the officers had violated 18 U.S.C. § 3109 by entering the iron gate without knocking at the gate and announcing their official purpose.¹³ The District Court admitted the evidence finding that the defendant had no reasonable expectation of privacy in the alcove area, and because of this could not expect 18 U.S.C. § 3109 to protect the area from official unannounced intrusion.¹⁴ The defendant appealed to the

7. 701 F.2d at 816.

8. *Id.*

9. *Id.*

10. *Id.* The officers had previously observed the layout of the entry-way and thus were aware that visitors gained entry to the apartment by notifying the occupants by ringing a buzzer near the gate. *Id.*

11. *Id.* Testimony at trial indicated that it was always the officers intention to knock and make an announcement at the inner solid door, rather than at the iron gate. Brief for Appellee at 11 n.7, *United States v. Moreno*, 701 F.2d 815. There was no dispute in the case that the entry at the solid door complied with 18 U.S.C. § 3109. 701 F.2d at 816 n.1.

12. 701 F.2d at 816.

13. *Id.*

14. *Id.* The district court also found that, should 18 U.S.C. § 3109 apply to the alcove area, the officers entry at the gate would have none-the-less been lawful. *Id.* It found that any attempt to knock and announce at the gate would have been futile because the occupants would have been unable to hear the knocking or announcement. *Id.* at 817. The district court also found that the officers' suspicions that easily disposable contraband was within the apartment would have served as exigent circumstances to excuse the officers' non-compliance with the statute. *Id.* at 817-18. On appeal these two additional findings were refuted by the Ninth Circuit. *Id.* It found that the officers could have rang the buzzer located near the gate in order to alert the occupants within the apartment of their presence, and thus the defendant would have been notified of the

Ninth Circuit contending, *inter alia*, that he did in fact have a reasonable expectation of privacy in the alcove area.¹⁵

B. THE KNOCK AND ANNOUNCE DOCTRINE

The concept requiring that notice be given before a lawful forcible entry into one's home has been traced back as far as biblical times,¹⁶ However, it was not until 1806, in *Semayne's Case*,¹⁷ that the King's Bench first required an official give notice and request admittance before forcing an entry into a citizen's home.¹⁸ The rule in *Semayne's Case* has been adopted by American courts,¹⁹ and acceptance of the rule today is evidenced by the fact that thirty-three states²⁰ and the federal government²¹ have codified the notice requirement.²²

officers' presence. *Id.* at 817. It also found that in the absence of sounds or other indications that contraband was being destroyed within the apartment, the officers' suspicions that drugs were in the apartment were insufficient to constitute the necessary exigent circumstances to excuse the officers' non-compliance with 18 U.S.C. § 3109. *Id.* at 818.

15. *Id.* at 816.

16. *Deuteronomy* 24:10. For detailed history of the evolution of the knock and announce doctrine from biblical times to 20th century See N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937); *Announcement in Police Entries*, 80 YALE L.J. 139 (1970).

17. 4 Coke 91, 77 Eng. Rep. 194 (K.B. 1603).

18. The King's Bench in *Semayne's Case* stated:

In all cases when the King is a party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open the doors.

4 Coke at 92, 77 Eng. Rep. at 195. Although the case has long served American courts as the leading decision regarding forcible entries by law enforcement officials executing a criminal warrant, *Semayne's Case* was actually civil in nature and resulted from a sheriff's refused entry rather than from his forced entry.

19. See *United States v. Manning*, 448 F.2d 992 (2nd Cir. 1971); *United States v. Gervato*, 474 F.2d 40 (3rd Cir. 1973); *United States v. Whiting*, 311 F.2d 191 (4th Cir. 1962); *United States v. Johns*, 466 F.2d 1364 (5th Cir. 1972); *Garza-Fuente v. United States*, 400 F.2d 219 (5th Cir. 1968); *United States v. Fields*, 355 F.2d 543 (5th Cir. 1966); *United States v. Carringer*, 541 F.2d 545 (6th Cir. 1976); *United States v. Lopez*, 475 F.2d 537 (7th Cir. 1973); *United States v. McClard*, 462 F.2d 488 (8th Cir. 1972), affirming District Court opinion at 333 F. Supp. 158 (1971); *United States v. Tolliver*, 665 F.2d 1005 (11th Cir. 1982); *Perkins v. United States*, 432 F.2d 612 (D.C. Cir. 1970), affirming District Court opinion at 286 F.Supp 259 (D.D.C. 1968); *United States v. Harris*, 435 F.2d 74 (D.C. Cir. 1970); *Keiningham v. United States*, 287 F.2d 126 (D.C. Cir. 1960).

20. For a complete discussion and list of state statutes See Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499 (1964).

21. 18 U.S.C. § 3109 (1964).

The federal codification of the rule requires that an officer executing a search warrant give notice of authority and purpose, and, be refused admittance before breaking in any window or door of a house.²³ In applying the federal statute for the first time, the United States Supreme Court in *United States v. Miller*,²⁴ stressed the importance of protecting the common law privacy interest which served as a basis for the statute, and stated that the statute was not to be given "grudging application."²⁵

Lower courts have applied the *Miller* decision as the controlling authority when applying 18 U.S.C. § 3109 to cases involving an official unannounced entry into a home.²⁶ The *Miller* decision, however, is limited to unlawful unannounced entries made into the home and does not address common law excep-

22. Early American courts, undoubtedly influenced by English Writs of Assistance, were quick to adopt *Semayne's Case*. "The act creating the Writs of Assistance granted the right of forcible entry to a customs official carrying a writ. He could take a constable or other civil official with him in the daytime to enter and go into my house, shop, cellar, warehouse or room or other place, and in case of resistance, to break open doors, chests, trunks and other packages, there to seize and from thence to bring any kind of goods or merchandise whatsoever, prohibited and uncustomed." 13-14 Charles II, c.II, c. § IV, V; made applicable to colonies: 7-8 William II, c. 22 § II (1696)." *Announcement in Police Entries*, 80 YALE L.J. 139, 145 n. 25 (1970). Note, however, that even these highly oppressive writs were to be executed only after an announcement and demand to enter the home were made. Thus, as early Americans were drafting the Bill of Rights, although no mention of a knock and announce requirement was included, with the abolished Writs of Assistance fresh in their minds, it is clear that they did not intend to lessen protection of the sanctity of the home by authorizing unannounced official entry, but rather considered the required announcement before official entry into one's home inherent in the authority to enter itself. Indeed, authorities agree that colonial's opposition to the English Writs of Assistance was so great that it became a major factor in sparking the American Revolution. See 80 YALE L.J. 139, and N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937).

23. See *supra* note 2.

24. 357 U.S. 301 (1958).

25. The *Miller* Court stated:

The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress codifying a tradition entrenched in Anglo-American law, had declared in § 3109 the reverence of the law for the individual's right of privacy in his house.

Id. at 313.

26. In *Miller*, which involved interpretation of a District of Columbia statute, the Court stated: "The validity of the entry to execute the arrest without a warrant must be tested by criteria identical with those embodied in 18 U.S.C. § 3109, which deals with entry to execute a search warrant." *Id.* at 306. See *Jones v. United States*, 362 U.S. 257 (1960).

tions to the notice requirement.²⁷

Lower courts have developed three exceptions to the rule. Courts require no notice where an announcement could endanger officers or others,²⁸ where an announcement would be a useless gesture in light of surrounding circumstances,²⁹ and where exigent circumstances necessitate an officer's unannounced entry.³⁰ The Supreme Court has ruled that a state statute authorizing an unannounced entry in exigent circumstances was constitutional,³¹ but has yet to decide on the applicability of any of the three aforementioned exceptions under 18 U.S.C. § 3109. Thus, until the Ninth Circuit's recent decision in *United States v. Fluker*,³² application of 18 U.S.C. § 3109 has remained limited to situations involving either an unlawful unannounced official entry into a home or an exception to the notice requirement.³³

27. 357 U.S. 301.

28. *See, e.g.*, *Rodriguez v. Jones*, 473 F.2d 599 (5th Cir. 1973).

29. *See, e.g.*, *United States v. Lopez*, 475 F.2d 537 (7th Cir. 1973).

30. *See, e.g.*, *United States v. Salvador*, 505 F.2d 1348 (8th Cir. 1974).

31. *Ker v. California*, 374 U.S. 23 (1963).

32. 543 F.2d 709 (9th Cir. 1976).

33. Most courts have uniformly held that once officers comply with 18 U.S.C. § 3109 at the entrance to the premises, no additional notice is required for doors within the premises. *See* *LAFAVE, SEARCH AND SEIZURE*, § 4.8 at 130-31. Courts have also generally permitted officers to gain entry to dwellings by ruse, without complying with the notice requirement. Typically, courts find that entry by ruse is not an exception to the notice requirement, but instead, since officers conducting the ruse are typically granted entrance freely by occupants, no rights of the occupants are violated. *See* *Lewis v. United States*, 385 U.S. 206 (1966); *United States v. Dohm*, 597 F.2d 535 (5th Cir. 1979); *United States v. Beale*, 445 F.2d 977 (5th Cir. 1971); *United States v. Hutchinson*, 488 F.2d 484 (8th Cir. 1973). Some courts have also extended the application of the notice requirement to officers' entrance to buildings other than personal dwellings. Note that in these cases, courts still limit application of the knock and announce rule to the entrance of the building. *See* *United States v. Mullin*, 329 F.2d 295 (4th Cir. 1964) (states in *dicta* that smokehouse located 75 feet from house would be protected by 18 U.S.C. § 3109); *United States v. Case*, 435 F.2d 766 (7th Cir. 1970) (extending 18 U.S.C. § 3109 to protect a printing store). *But see* *United States v. Johns*, 466 F.2d 1364 (5th Cir. 1972) (refusing to find that small building near defendant's house was covered by 18 U.S.C. § 3109); *Fields v. United States*, 355 F.2d 543 (5th Cir. 1966) (finding that a chicken coop was not covered by the notice requirement); *United States v. Francis*, 646 F.2d 251 (6th Cir. 1982) (finding that a barbershop was not covered by the notice requirement); *United States v. Hassel*, 336 F.2d 684 (6th Cir. 1964) (finding that a barn was not protected by the statute); *United States v. McClard*, 462 F.2d 488 (8th Cir. 1972) (holding that the notice requirement did not apply to a barn, where the door was already open); *United States v. Agrusa*, 541 F.2d 690 (8th Cir. 1976) (finding that the notice statute does not protect businesses).

The Ninth Circuit in *United States v. Fluker*,³⁴ found that 18 U.S.C. § 3109 applied to the entrance of a common hallway which led to two inner apartments.³⁵ In *Fluker*, where the officers made no attempt to notify occupants of the apartments prior to breaking into the common hallway, the court held that the entry violated 18 U.S.C. § 3109.³⁶ In arriving at its holding, the court reviewed the decision of *Wattensburg v. United States*,³⁷ where the court found that the fourth amendment prohibited an unannounced search and seizure adjacent to a house.³⁸ In *Wattensburg*, the search was found to violate the fourth amendment because it constituted an intrusion upon what the resident had sought to preserve as private.³⁹ The court in *Fluker* concluded that in light of *Wattensburg*, the critical question in determining whether 18 U.S.C. § 3109 applied to the common hallway entrance was whether the defendant had a reasonable expectation of privacy in the hallway area.⁴⁰ The court determined that the defendant did have a reasonable expectation of privacy in the area, and consequently found 18 U.S.C. § 3109 applicable to the hallway adjacent to the defendant's apartment.⁴¹

The *Fluker* court, noting the absence of any Supreme Court or federal appellate court precedent, cited *United States v. Blank*⁴² as the only authority supporting its decision to apply 18 U.S.C. § 3109 to an area other than the home itself.⁴³ In *Blank*,⁴⁴ officers broke into a common hallway unannounced, proceeded to the defendant's apartment door, and broke into the defen-

34. 543 F.2d 709 (9th Cir. 1976).

35. *Id.* at 716-17.

36. *Id.*

37. 388 F.2d 853 (9th Cir. 1968).

38. *Id.* at 858. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

39. 388 F.2d at 857.

40. 543 F.2d at 716.

41. *Id.* at 716-17.

42. 251 F. Supp. 166 (N.D. Ohio 1966).

43. 543 F.2d at 715.

44. 251 F. Supp. 166.

dant's apartment unannounced.⁴⁵ The defendant contended that both entries violated the fourth amendment, and that the entry into his apartment violated a statute prohibiting such unannounced entry.⁴⁶ Concluding that the officer's unannounced entry into the common hallway was in violation of the fourth amendment, the court deemed it unnecessary to analyze the officer's second entry into the defendant's apartment.⁴⁷ In considering whether the defendant had a protected interest in the common hallway,⁴⁸ the *Blank* court found that the defendant's ability to lock the door and to exclude others "denotes a right of privacy," and that this privacy interest was protected from official unannounced intrusion under the fourth amendment.⁴⁹ Thus, the *Blank* court held that under the fourth amendment, officers must announce their presence, identity and purpose prior to forceful entry into private premises.⁵⁰

The Supreme Court has not considered whether the Fourth Amendment requires officers to give notice of their authority and purpose before forcibly entering a dwelling.⁵¹ In *Ker v. United States*,⁵² however, Justice Brennan, in a dissent joined by the three other members of the Court, expressed the opinion

45. *Id.* at 167.

46. *Id.* at 168. The statute referred to in *Blank* is not identified in the opinion.

47. *Id.* at 175.

48. *Id.* at 168-74.

49. The *Blank* court stated:

The tenants possess a joint right, subject to the landlord's right to enter and use common portions of the premises, to exclude from or to admit to those premises whomever they choose. This area is by no means public. A locked door excluding the public from certain privately owned or leased property denotes a right of privacy therein to those who have the right to lock that door. . . . We hold that the petitioner does possess a protected interest in the integrity of the entire premises.

Id. at 173.

50. In reference to the fourth amendment, the *Blank* court held:

This constitutional amendment requires that even when warrants are properly issued, the conduct of the executing officers must not exceed the bounds of reason Part of the boundary of reason is formed by the requirement that officers of the law must announce their presence, identity and purpose prior to their entrance upon private premises to execute a search warrant.

Id. at 167.

51. See *United States v. Francis*, 646 F.2d 251, 257 (6th Cir. 1981).

52. 374 U.S. 23 (1963).

that the fourth amendment prohibits an unannounced forcible entry by police officers.⁵³ Justice Marshall in *United States v. Sabbath*,⁵⁴ referred to the notice requirement as a "possible constitutional rule relating to announcement and entry,"⁵⁵ indicating that the constitutional basis for the rule is still in question. The few courts which have confronted the issue have all concurred with *Blank*, and with Justice Brennan's dissent in *Ker*, finding that notice before forced entry is an inherent requirement of the fourth amendment.⁵⁶

The courts which have held that notice is required under the fourth amendment additionally have found that notice is necessary under the federal statute when the area entered is a house.⁵⁷ Alternatively, as in *Francis v. United States*,⁵⁸ the court may find that although 18 U.S.C. § 3109 does not prevent officers from forcibly entering an area unannounced, the fourth amendment does prohibit the entry.⁵⁹ In *Francis*, the Third Circuit found that a barbershop was not included within the meaning of a "house" as defined under 18 U.S.C. § 3109, and was consequently not protected by the statute.⁶⁰ The court alternatively considered whether the fourth amendment prohibited the officer's unannounced intrusion into the barbershop. The court found that the fourth amendment did prohibit the intrusion and held the entry unlawful.⁶¹

53. *Id.* at 46-47.

54. 391 U.S. 585 (1968).

55. *Id.* at 591.

56. See *United States v. Valenzuela*, 596 F.2d 824, 830 (9th Cir. 1979); *United States v. Francis*, 646 F.2d 251, 258 (6th Cir. 1981); and *United States v. Gable*, 276 F. Supp. 555, 557 (E.D.C. Pa. 1967).

57. See *United States v. Price*, 441 F. Supp. 814 (D.C. Ark. 1977), where the court stated that "[i]n applying that tradition vis-a-vis either the fourth amendment or § 3109, courts have consistently held that before officers enter upon private premises to conduct a search pursuant to a warrant, they must make an announcement of their identity, authority and purpose for seeking entry," *Id.* at 817.

58. 646 F.2d 251 (3rd Cir. 1981).

59. *Id.* See also *Wattenburg*, where the court stated: "The protection afforded by the Fourth Amendment, insofar as houses are concerned, has never been restricted to the interior of the house, but has extended to open areas immediately adjacent thereto." 388 F.2d at 857.

60. 646 F.2d at 256.

61. *Id.* at 257-58. See also *United States v. Miguel*, 340 F.2d 812 (2nd Cir. 1965) (holding that the fourth amendment does not protect an apartment dweller from official intrusion into a common lobby); *United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976) (finding that an apartment dweller had a reasonable expectation of privacy in a common hallway and that the defendant's fourth amendment rights were thus violated by the

C. REASONING OF THE COURT

In reversing the district court, the Ninth Circuit in *Moreno* cited three interests protected by 18 U.S.C. § 3109.⁶² They found that it "provides protection from violence, assuring the safety and security of both the occupants and the entering officers,"⁶³ "protects 'the precious interest of privacy summed up in the ancient adage that a man's house is his castle' ";⁶⁴ and finally that it "protects against the needless destruction of private property."⁶⁵ The court held that in accord with these interests, and contrary to the district court's finding, the defendant did in fact have a reasonable expectation of privacy in the alcove area, and that the alcove area was actually part of the defendant's apartment.⁶⁶ In support of this reasoning, the court noted the defendant's complete control of the gate, his exclusive use of the alcove, that the alcove was formed by three walls of the defendant's apartment, and that nonresidents could gain access into the alcove only after ringing a buzzer located near the gate.⁶⁷ The court noted that these factors, similar to those considered by the court in *Fluker*,⁶⁸ indicated a reasonable expectation of privacy.⁶⁹ The court rejected the lower court's consideration of the visual accessibility of the alcove as a pertinent factor stating that "[t]he statute expressly applies to windows, clearly indicating that an officer's ability to see into an area does not defeat the occupants' privacy and security interests in it."⁷⁰

Thus, relying on their decision in *Fluker*,⁷¹ the court con-

officers' unreasonable intrusion); *Care v. United States*, 231 F.2d 22 (10th Cir. 1956) (applied the fourth amendment to a cave near a dwelling).

62. 701 F.2d at 817.

63. *Id.* citing *United States v. Bustamante-Gamez*, 488 F.2d 4 (9th Cir. 1973) and *United States v. Fluker*, 453 F.2d 709 (9th Cir. 1976).

64. 701 F.2d at 817 (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)).

65. 701 F.2d at 817 (citing *Bustamante-Gamez*, 488 F.2d 4, and *United States v. Crawford*, 657 F.2d 1041 (9th Cir. 1981)).

66. 701 F.2d at 817.

67. *Id.*

68. 543 F.2d 709. In *Fluker*, the court noted that there were only three apartments in the building entered by the officers, the outer door of the building was kept locked, only the three apartment residents had keys, and the defendant's apartment was within reach of the outer door. *Id.* at 716.

69. 701 F.2d at 817.

70. *Id.*

71. 543 F.2d 709.

cluded that the defendant had a reasonable expectation of privacy in the alcove, and also that the alcove was a part of the defendant's apartment. Since the alcove was considered part of the defendant's apartment, the court found that the officers should have complied with 18 U.S.C. § 3109 before entering through the gate.⁷²

D. ANALYSIS

The court in *Moreno* mistakenly relied on *Fluker*⁷³ in applying the reasonable expectation of privacy test to 18 U.S.C. § 3109. In addition, factors cited by the court fail to establish that the alcove outside the defendant's apartment should be considered as part of the defendant's apartment. Finally, the court's improper extension of the statute appears to have been unnecessary in light of an analogous line of cases which have applied the fourth amendment to similar facts.

The *Moreno* court, in determining that the reasonable expectation of privacy test was applicable under the statute, improperly relied upon the *Fluker* court's mistaken application of the test to the statute. The Ninth Circuit in *Fluker* determined that, according to its decision in *Wattenburg v. United States*,⁷⁴ the appropriate test in determining if an area was protected by 18 U.S.C. § 3109 was whether the defendant had a reasonable expectation of privacy in that area.⁷⁵ The court in *Fluker* however, failed to recognize that the decision in *Wattenburg* involved an open area 20-35 feet from the defendant's home, and was based solely on the fourth amendment rights of the defendant.⁷⁶ *Wattenburg* did not involve the application of 18 U.S.C. § 3109. Similarly, the *Fluker* court mistakenly found that the

72. 701 F.2d at 817. After finding that the statute did apply to the alcove area, the court considered the government's contention that the inevitable discovery doctrine was applicable and warranted admission of the evidence. *Id.* at 819. The court rejected this argument stating that the inevitable discovery doctrine "requires that the otherwise inadmissible evidence would have been discovered independently by legal means Because we do not view the second entry as independent of the unlawful entry, we do not apply the 'inevitable discovery' rule." *Id.*

73. 543 F.2d 709.

74. 388 F.2d 853.

75. 543 F.2d at 716 (citing *Wattenburg*, 388 F.2d at 857).

76. 388 F.2d at 858.

decision in *Blank*⁷⁷ applied 18 U.S.C. § 3109 to an outer door of an apartment building.⁷⁸ Although the defendant in *Blank* claimed both a statutory and a fourth amendment violation,⁷⁹ the court based the decision solely on the fourth amendment.⁸⁰ The *Fluker* court was thus the first court to apply the reasonable expectation of privacy test to 18 U.S.C. § 3109, and it appears to have done so under the mistaken impression that the courts in *Blank* and *Wattenburg* had done the same.⁸¹ Consequently, by applying *Fluker*, the *Moreno* court has relied on a mistaken determination that the reasonable expectation of privacy test had been applied to 18 U.S.C. § 3109.

It is well established that the reasonable expectation of privacy test is appropriate in determining whether an area is protected under the fourth amendment.⁸² It is not clear that the same test is appropriate in determining whether an area is protected under 18 U.S.C. § 3109.

The court in *Fluker* determined that where a defendant had a reasonable expectation of privacy in an area outside his apartment, that area was covered by the statute.⁸³ In relying on the reasonable expectation test in *Fluker*, the court in *Moreno* fails to recognize that although a person will typically maintain a reasonable expectation of privacy in the area constituting his or her home, the same person may also have a reasonable expectation of privacy in a variety of other areas such as a phone booth,⁸⁴ a public restroom,⁸⁵ or an automobile.⁸⁶ Clearly these areas cannot be considered part of a home.

The reasonable expectation of privacy test employed by the Ninth Circuit in *Moreno* is thus overly broad, and does not provide an exclusive factor indicating that an area should be consid-

77. 251 F. Supp. 166.

78. 543 F.2d at 715.

79. 251 F. Supp. at 168.

80. *Id.* at 175.

81. See *United States v. Fluker*, 543 F.2d 709, where the court notes the absence of any cases, with the exception of *Blank*, 251 F. Supp. 166, which expand the application of 18 U.S.C. § 3109 beyond the entrance of a home or dwelling. 543 F.2d at 715.

82. See *Katz v. United States*, 389 U.S. 347 (1967).

83. 543 F.2d at 716.

84. *Katz v. United States*, 389 U.S. 347 (1967).

85. *State v. Bryant*, 287 Minn. 205 (1970).

86. *Coolidge v. New Hampshire*, 403 U.S. 433 (1971).

ered part of a home, or covered under the statute.

The court in *Fluker* cited several factors which supported its finding that the defendant had a reasonable expectation of privacy in the common hallway.⁸⁷ The court found that based on this reasonable expectation of privacy, the common hallway was protected under the statute.⁸⁸ The court in *Moreno* took this reasoning one step further and found that the factors indicating the defendant had a reasonable expectation of privacy in the alcove also indicated that the alcove was actually part of the defendant's apartment.⁸⁹ Thus, the court found the alcove protected under the statute because it was considered part of the defendant's apartment.⁹⁰ Though factors cited by the court indicate the defendant may have had a reasonable expectation of privacy in the alcove area, there is no indication that the alcove was actually part of the defendant's apartment.

Exclusive control and access to the area indicate that the defendant may have expected the alcove to remain free from unreasonable intrusion, but these factors do not change the physical structure of the apartment. The alcove outside the defendant's apartment does not become a part of the defendant's apartment merely because it is in the defendant's exclusive control. Exclusive control is typically exercised by the possessor of real and personal property, however it cannot be assumed that property in one's exclusive control is automatically part of one's home.

The court also found it significant that the alcove was formed of three outer walls of the defendant's apartment.⁹¹ The code specifically provides for protection of areas within the home, but makes no provision for protection of areas adjacent to the outer walls of a home.⁹² The alcove provided access to the solid front door, and the solid front door provided access to the defendant's apartment.⁹³ The court cited no facts to indicate the

87. See *supra* note 59.

88. 543 F.2d at 716.

89. 701 F.2d at 817.

90. *Id.*

91. *Id.*

92. See *supra* note 2.

93. 701 F.2d at 816.

defendant used the alcove for any purpose other than gaining access to his front door. Though the alcove, just as a sidewalk or driveway, may have been used to gain access to a dwelling, there is no indication that the alcove was actually a part of the apartment and thus covered under the statute.

Although the Supreme Court has not held that notice is required under the fourth amendment,⁹⁴ lower court decisions dealing with the issue indicate a trend toward finding such a requirement.⁹⁵ According to these courts, the fourth amendment requires that officers give notice of their authority and purpose before entering an area in which a person maintains a reasonable expectation of privacy.⁹⁶ These courts require notice regardless of whether the area entered by officers was found to be part of a house.⁹⁷ Thus, under this view, an unannounced forcible entry into a home would be prohibited by both the fourth amendment and by 18 U.S.C. § 3109.⁹⁸ However, an unannounced entry into an area adjacent to a house would be covered by the Fourth Amendment, but would not be covered by 18 U.S.C. § 3109.⁹⁹ The legislative intent and historical application of the statute indicate that the statute was intended to protect the home only.¹⁰⁰ Consequently, the fourth amendment is the only appropriate protection to apply when confronted with an official unannounced entry into an area adjacent to a house.

The Ninth Circuit in *Wattensburg v. United States*,¹⁰¹ found that the fourth amendment protected an open area used to store wood, located approximately 20-35 feet from the defendant's home, from a warrantless intrusion. The *Wattensburg* court found that the appropriate test in determining if a search and seizure adjacent to a house was constitutionally forbidden was whether it constituted an intrusion upon what the resident sought to preserve as private.¹⁰² In *Blank*,¹⁰³ relied upon by the

94. See *supra* p.6.

95. See *supra* notes 49-53 and accompanying text.

96. *Id.*

97. See *supra* note 59.

98. See *supra* note 57.

99. See *supra* notes 58-61 and accompanying text (discussion of *Francis*).

100. See *supra* notes 22 and 25.

101. 388 F.2d at 853.

102. *Id.* at 857.

103. 251 F. Supp. 166.

Ninth Circuit in *Fluker*,¹⁰⁴ the court stated that under the fourth amendment, officers were required to give notice of their authority and purpose before entering a common area shared by apartment residents.¹⁰⁵ The court in *Moreno* found that the defendant had a reasonable expectation of privacy in the area, the area was adjacent to the defendant's apartment, and the area was entered by officials without announcement. Thus, as in *Wattenburg* and *Blank*, the fourth amendment would have sufficiently protected the alcove from an unreasonable intrusion, and an extended application of the statute was unnecessary.

It is unclear why the Ninth Circuit chose to apply the federal statute to the facts in *Moreno* rather than apply the fourth amendment as it did in *Wattenburg*. Given the current trend of applying the fourth amendment to facts similar to those in *Moreno*,¹⁰⁶ it appears that the Ninth Circuit should have applied the fourth amendment, and thus avoided straining the federal statute.

*Thomas M. Hostetler**

OTHER DEVELOPMENTS IN CRIMINAL LAW & PROCEDURE

A. *Grand Jury Witnesses' Right to Inspect Government Documents*

In *In re McElhinney*,¹ the Ninth Circuit held that a grand jury witness is entitled to conditional access to government documents for the purpose of challenging the legality of the government's wiretapping of his telephone.

The witness, Todd McElhinney, refused to testify before a

104. 543 F.2d at 715.

105. 251 F. Supp. 167. *See supra* note 40.

106. *See supra* pp. 6-7.

* Hastings College of the Law, Class of 1985.

1. 698 F.2d 384 (9th Cir. 1983) (per Goodwin, J., the other panel members were Skopil and Boochever, J.J.) (as revised Jan. 31, 1983).

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federal grand jury, claiming that the questions asked were based on information obtained from the government's illegal monitoring of his telephone conversations.² After the government admitted using a court-ordered wiretap, McElhinney requested disclosure of government documents for a limited hearing on the legality of the wiretap.³ The trial court denied McElhinney's request concluding that an *in camera* inspection of the documents was sufficient to determine the legality of the wiretap.⁴ When McElhinney persisted in his refusal to testify, the court held him in contempt and ordered him confined.⁵ McElhinney appealed the confinement order.⁶

In several previous cases, the Ninth Circuit rejected a plenary suppression hearing on the wiretap issue because such a hearing would disrupt and delay the grand jury investigation.⁷ In these rulings, the Ninth Circuit adopted the Second Circuit's holding in *In re Persico*.⁸ The *Persico* court held a witness is not entitled to a plenary suppression hearing on the issue of whether the questions posed are the product of unlawful electronic surveillance.⁹

In *McElhinney*, the Ninth Circuit distinguished earlier cases which denied hearings, noting that McElhinney requested a limited, not a plenary, hearing.¹⁰ The Ninth Circuit found in the *Persico* reasoning a balance between the competing policies

2. *Id.* at 384. McElhinney had been granted immunity before being ordered to testify. *Id.*

3. *Id.* McElhinney requested the application of the Attorney General for authorization to conduct the wiretap, the affidavit in support of the application, the court order authorizing the wiretap, and the affidavit describing the duration of the wiretap. *Id.*

4. *Id.* at 385. The trial court concluded that further review of the matter would unduly delay the grand jury proceedings. *Id.*

5. *Id.* at 384.

6. *Id.*

7. *Droback v. United States*, 509 F.2d 625 (9th Cir. 1974), *cert. denied*, 421 U.S. 964 (1975) (no plenary challenge was permitted), *In re Gordon*, 534 F.2d 197 (9th Cir. 1976) (the court allowed no plenary hearing on the issue of availability of alternative investigative techniques at the time the court-ordered electronic surveillance), *United States v. Canon*, 534 F.2d 139 (9th Cir.), *cert. denied*, 425 U.S. 991 (1976) (a witness was not allowed to delay a grand jury hearing by litigating the validity of the surveillance).

8. 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924 (1974).

9. *Id.* at 1162. *But cf.* *In re Lochiatto*, 497 F.2d 803 (1st Cir. 1974), in which the First Circuit allowed access to government documents for a limited hearing absent a government need for secrecy. 497 F.2d at 807.

10. 698 F.2d at 385.

of exclusion of illegally obtained evidence and the demand for unimpeded grand jury proceedings, with the balance weighing in favor of unimpeded grand jury proceedings.¹¹ The court noted that granting McElhinney a limited hearing would not upset this balance, as the short time spent on a limited hearing promotes the policy of excluding illegally obtained evidence.¹² The Ninth Circuit held that McElhinney had the right to examine the requested documents,¹³ but he could not use any additional evidence to support his challenge of the wiretap.¹⁴

The court ruled that if the government objects to disclosure on security grounds,¹⁵ the district court must determine *in camera* the sensitivity of the documents.¹⁶ The witness is then allowed to inspect relevant documents judged not sensitive.¹⁷

Accordingly, *McElhinney* establishes that a witness in the Ninth Circuit may inspect government documents when challenging a court-ordered¹⁸ wiretap he or she contends is illegal.

B. *The Pretextual Use of a Warrant to Justify a Custodial Detention Violates the Fourth Amendment*

In *United States v. Prim*,¹ the Ninth Circuit held that federal agents could not rely on an outstanding nonsupport warrant to justify a custodial detention where the agents stated that their actual purpose for the detention was to interrogate and search a suspected narcotics trafficker. The court stated that such a pretextual justification for an arrest or search violates the fourth amendment.

11. *Id.*

12. *Id.*

13. *See supra* note 3.

14. 698 F.2d at 385-86.

15. *Id.* at 385.

16. *Id.*

17. *Id.*

18. The Supreme Court has ruled that a grand jury witness may use an unauthorized wiretap as a defense to a contempt charge for refusal to testify. *Gelbard v. United States*, 408 U.S. 41 (1972). The Court specifically left to trial courts the decision to allow testimony based on court-ordered wiretaps. 408 U.S. at 61, n.22.

1. 698 F.2d 972 (9th Cir. 1983) (per Takasugi, D.J., sitting by designation; the other panel members were Hug, J., concurring, and Alarcon, J., dissenting).

While the defendant waited at the Portland airport for a plane to Honolulu, his nervous behavior aroused the suspicion of police who subsequently placed him under surveillance. After departing on his flight, the police relayed information that the defendant had been involved in a 1979 narcotics investigation to DEA agents in Honolulu.² Portland police then discovered an outstanding Oregon nonsupport warrant for the defendant. Police also relayed information to the Hawaiian agents about the warrant.³

Upon arrival at the Honolulu airport, DEA agents stopped the defendant and checked his identification. After informing him of their suspicion that he was trafficking in narcotics, they escorted him to an "office."⁴ The warrant for nonsupport was not mentioned. In the interrogation room, agents asked the defendant twice to consent to a search of his person and effects, but both times he refused. The agents had the defendant empty his pockets. In doing so, he neglected to remove an envelope which caused a bulge in a front pocket.⁵ After conducting a pat-down search and removing the envelope which later turned out to be cocaine, the agents arrested the defendant. The District Court found that the detention and search did not violate the defendant's fourth amendment rights because of the Oregon arrest warrant.⁶ On appeal to the Ninth Circuit, defendant contended that the detention constituted an arrest without probable cause since the agents detained him for no other reason than to conduct a custodial interrogation and to obtain consent to search his person and property.⁷

According to the Ninth Circuit, the record established that the agents' actions were motivated only by their suspicion that the defendant was a drug trafficker. Judge Takasugi, writing for the Court, rejected the government's contention that the warrant provided probable cause for the agents' actions.⁸ He stated that although probable cause is judicially viewed under an objec-

2. *Id.* at 973-74.

3. *Id.* at 974.

4. *Id.*

5. *Id.*

6. *Id.* at 975.

7. *Id.*

8. *Id.*

tive standard "the nonsupport warrant was not the cause of the officers' action and thus not the cause to which the objective standard should be applied."⁹ Judge Takasugi reasoned that, if anything, the warrant provided a *pretext* after the fact to justify the agents' actions, and such pretextual use violates the fourth amendment.¹⁰

Finding no probable cause, Judge Takasugi next focused on the defendant's detention in the interrogation room. In light of the Supreme Court's decision in *Dunaway v. New York*,¹¹ Judge Takasugi determined that the detention constituted custodial interrogation, which like an arrest required justification with probable cause.¹² He distinguished the Supreme Court's decision in *United States v. Mendenhall*,¹³ which upheld a consensual relocation to an airport interrogation room, by noting that here there was no evidence that the defendant consented to the relocation and detention for interrogation.¹⁴ Judge Takasugi pointed out that even if the relocation were constitutional, the continued detention after the defendant's refusal to consent to a search constituted custodial interrogation without probable cause under the reasoning of *Dunaway* and *Chamberlin*.¹⁵ He reasoned that

9. *Id.* Judge Takasugi emphasized that he did not mean to base probable cause on the subjective state of mind of the officers. *Id.*

10. *Id.* (emphasis added). See, *Abel v. United States*, 362 U.S. 217 (1960); *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976).

11. 442 U.S. 200 (1979). In *Dunaway*, the Court held that the relocation of a suspect to police headquarters for custodial interrogation requires probable cause. The Court reasoned that a detention for custodial interrogation intrudes so severely on interests protected by the fourth amendment that it necessarily triggers the traditional safeguards against illegal arrest. *Id.*

12. 698 F.2d at 976-77.

13. 446 U.S. 544. In *Mendenhall*, the defendant was stopped in the airport as she got off a plane and subsequently relocated to the DEA office for questioning. After finding the initial stop valid the Court validated the relocation stating that the evidence was sufficient to support a finding that the defendant voluntarily consented to the relocation. *Id.*

14. 698 F.2d at 976-77. Judge Takasugi made it clear that *Terry v. Ohio*, 392 U.S. 1, which allows a "stop" based on articulable suspicion, did not apply to the relocation since it involved a greater intrusion than a brief investigatory stop. 698 F.2d at 977.

Judge Takasugi followed *United States v. Chamberlin*, 644 F.2d 1262 (9th Cir. 1980) (twenty-minute detention of suspect in back of police car while officer searched for suspect's companion was detention for custodial detention) and distinguished *United States v. Post*, 607 F.2d 847 (9th Cir. 1979) (relocation of a suspect to an airport interview room based upon articulable suspicion valid where there was no explicit finding of involuntariness).

15. 698 F.2d at 977.

the subsequent pat-down search was unjustified, and the cocaine taken from the defendant was thereby tainted by the illegal detention.¹⁶ Further, Judge Takasugi stated that the pat-down search could not be justified because the agents actually expected to find narcotics in the bulge of the defendant's pocket. A pat-down, he stated, is properly limited only to a search for weapons.¹⁷

Judge Hug concurred with the majority opinion that even if the relocation was constitutional, the continued detention constituted custodial interrogation without probable cause.¹⁸ He also agreed that the government's reliance on the warrant to provide probable cause for the detention represented an after the fact justification for an unlawful search. He stated that an arrest cannot be used as a pretext to search for evidence of an unrelated crime.¹⁹

Judge Alarcon, dissenting, maintained that the majority improperly based probable cause for arrest upon the agent's subjective state of mind.²⁰ He stated that the probable cause determination must be based on objective facts that could justify the issuance of a warrant, not on the agent's subjective state of mind.²¹ Applying this standard, he reasoned that the objective facts known to the agents prior to the detention and search, including the outstanding warrant, established probable cause to arrest.²² Since by his analysis the arrest was lawful, Judge Alarcon found the subsequent search of the defendant justified as a search incident to arrest.²³

Judge Alarcon disagreed with the majority's conclusion that

16. *Id.* at 977. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

17. 698 F.2d at 977. See *Adams v. Williams*, 407 U.S. 143, 146 (1972).

18. 698 F.2d at 978.

19. *Id.* at 978. See *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932); *Williams v. United States*, 418 F.2d 159, 161 (9th Cir. 1969) *aff'd* 401 U.S. 646 (1971).

Judge Hug, in his concurrence, also asserted that the DEA agents were without power to arrest the defendant on state charges. See 21 U.S.C. § 878 which limits the authority of federal law enforcement officers. See also, *United States v. Diamond*, 471 F.2d 771, 773 (9th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973).

20. 698 F.2d at 980 (emphasis in original).

21. *Id.* See *United States v. Ross*, 456 U.S. 798, 808 (1982).

22. 698 F.2d at 980.

23. *Id.* at 979. See *Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Robinson*, 414 U.S. 218, 235 (1973).

the agents used the nonsupport warrant as a pretext for the search.²⁴ He believed that the record demonstrated that the agents had acted in complete good faith and exhibited great sensitivity in choosing the least intrusive means of interfering with the rights of an individual under suspicion. He stated that the agents could have made an immediate and embarrassing arrest in the middle of the airport, but instead chose to make a quiet and discreet request of the defendant in the hope that he would consent to a search. Judge Alarcon reasoned that this conduct did not violate the fourth amendment, which prohibits only unreasonable law enforcement conduct.²⁵

C. *Waiver of Counsel*

In *Evans v. Raines*,¹ the Ninth Circuit held that a limited retrospective state court hearing is sufficient to determine whether the defendant is competent to waive counsel and whether a waiver was intelligently made.

The defendant was charged with rape and kidnaping for rape. Based on psychiatric evaluations, the state court found the defendant competent to stand trial. When the defendant asked to represent himself, the court admonished him of the risks and responsibilities of self representation.² However, the court neither informed the defendant of the maximum punishment for the offenses charged, nor held a hearing to determine defendant's competency to represent himself. The defendant was convicted on both counts.³

The conviction was affirmed by the Supreme Court of Arizona.⁴ The defendant filed a habeas corpus petition in the district court, contending that the trial record did not disclose

24. 698 F.2d at 980.

25. *Id.* In response to Judge Hug's assertion that the federal agents lacked authority to arrest pursuant to the Oregon arrest warrant, Judge Alarcon maintained that the agents were authorized to make arrests under a Hawaiian statute. In addition, he noted that a Hawaiian police officer who had authority to arrest pursuant to the Oregon warrant was present at the defendant's detention and search. *Id.* at 979.

1. 705 F.2d 1479 (9th Cir. 1983) (per Smith, J., sitting by designation; the other panel members were Merrill, J. and Boochever, J., concurring and dissenting in part).

2. *Id.* at 1482.

3. *Id.* at 1480.

4. *State v. Evans*, 125 Ariz. 401, 610 P.2d 35 (1980).

whether defendant was competent to waive counsel or whether the waiver was intelligently made.⁵ The district court ordered defendant's release unless proceedings for a new trial were commenced, and the state appealed to the Ninth Circuit.

In reviewing the district court's order, the Ninth Circuit stated that a defendant cannot intelligently waive counsel unless he is apprised of the penalties which may be imposed for the crimes which he is charged. Because the state court provided no such information, the court noted that the defendant could not have intelligently waived counsel.⁶

On the issue of competency to waive counsel, the court, citing *Westbrook v. Arizona*,⁷ noted that a higher level of competency is required to waive counsel than is necessary to stand trial. In absence of findings or a hearing on defendant's competency to waive counsel, it was necessary to remand to state court so this determination could be made.⁸

In deciding whether a new trial was necessary, or whether a limited remand would suffice, the court cited *United States v. Kimmel*.⁹ In *Kimmel*, the court held that a limited remand is proper to supplement a record that does not show a knowing and intelligent waiver of counsel.¹⁰

The court further stated that a retrospective competency hearing is sufficient to determine if a defendant is competent to waive counsel. The court, relying upon two decisions involving guilty pleas,¹¹ found no reason for applying a different rule where competency to waive counsel is at issue.¹² Accordingly, the case was remanded to district court with directions to send the case to state court for a further hearing to hold a competency hearing.

5. *Evans v. Raines*, 534 F.Supp. 791 (D. Ariz. 1982).

6. 705 F.2d at 1480.

7. 384 U.S. 150 (1966).

8. 705 F.2d at 1480.

9. 672 F.2d 720 (9th Cir. 1982).

10. *Id.* at 722-23.

11. *Chavez v. United States*, 656 F.2d 512 (9th Cir. 1981) and *Sieling v. Eymin*, 478 F.2d 211 (9th Cir. 1973).

12. 705 F.2d at 1481.

Judge Merrill, concurring, suggested that when counsel is waived that the colloquy between court and defendant be placed on the record.¹³ He noted that this would eliminate the need for further litigation in such cases to determine if the waiver was made intelligently.¹⁴ However, he would not require that such a record be made as a matter of constitutional right.¹⁵

Judge Boochever, concurring in part and dissenting in part, questioned the propriety of holding a competency hearing at this point in the litigation.¹⁶ He stated that if this were a federal case he would simply affirm the district court's order. He noted, however, that since this was a state case, the decision on the feasibility of holding such a hearing should be left to the state court.¹⁷

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 1482.

17. *Id.*